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# REPORTS OF CASES

DECIDED IN THE

# COURT OF CHANCERY

OF THE

## STATE OF NEW JERSEY,

N. SAXTON, Reporter.

*SECOND EDITION,*

WITH NOTES BY JOHN LINN, Esq., OF THE HUDSON COUNTY BAR.

VOLUME I.

JERSEY CITY:
FREDERICK D. LINN & CO.
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CHANCELLOR
DURING THE PERIOD OF THIS REPORT,
Hon. PETER D. VROOM.

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# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

# STATE OF NEW-JERSEY,

AT JANUARY TERM, 1830.

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## THE PRESIDENT AND DIRECTORS OF THE BANK OF NEW-BRUNSWICK v. AARON HASSERT AND OTHERS.

Mere inadequacy of price is not sufficient to avoid a contract, or set aside a sale made by the sheriff, when no fraud or irregularity appears.

*Semble.* That leaving personal property purchased at sheriff's sale in the possession of the defendant, is not, of itself, sufficient to vitiate the sale.

The bill in this case was filed by the complainants, execution creditors, against the defendant in execution, the sheriff, and the purchasers at a sheriff's sale, made under a prior execution; to set aside the sale on the ground of inadequacy of price, and alleged fraud and irregularity in the sale; by which the rights of the complainants, as subsequent execution creditors, were defeated. Disborough and Hutchings, the purchasers, answered the bill, denying the charges of fraud and irregularity complained of. Witnesses were examined. The facts of the case appear more fully in the opinion of the court. The case was argued by

*C. L. Hardenbergh*, for the complainants.

*G. Wood*, for the defendants.

THE CHANCELLOR. The object of this bill is to set aside a sheriff's sale, on the grounds of fraud and inadequacy of price, and to procure a re-sale of the property. It is charged in the bill, that in June, 1820, the complainants obtained a judgment against Aaron Hassert, for three hundred and ninety-eight dollars and twenty-seven cents, on which an execution issued, and was placed in the hands of Abraham Vanarsdale, esquire, sheriff of the county of Middlesex; who levied on various articles of personal property, and on one farm and sundry lots, containing two hundred acres of land, subject to incumbrances: that there were other unsatisfied judgments and executions against the same defendant, one of which was in favor of the executors of Jacques Voorhees, deceased, and was prior to the complainants': that considering the debt safe, the execution was not pressed, but proceedings under it were several times postponed at the special instance of Hassert, the defendant, he promising that the money should be shortly paid: that Hassert afterwards procured a sale to be made by the sheriff, without the knowledge of the complainants, and with the intent to defraud them: that the sheriff sold the real and personal property in November, 1823, without having advertised the same for that day, and without any regular adjournment from some previous day: that the sale was conducted by the sheriff, so as to defeat the claims of creditors, and meet the views of the defendant in execution. The household furniture was sold all together, for a nominal sum. The personal property, worth eight hundred to one thousand dollars, was sold for less than seventy dollars. That the real property was sold for a mere nominal price. That Disborough and Hutchings, two of the defendants, purchased a considerable part of the real as well as of the personal estate, with the express understanding that Hassert should have the property again on paying some trifling consideration. That the personal property was not removed, but remained after the sale, as before, in the possession of the defendant in execution; and that, in consequence of the fraudulent conduct on the part of the defendant, the sheriff and the purchasers, the whole amount of sales was absorbed in the payment of the first execution, in favor of the executors of

Jacques Voorhees, above mentioned: and the complainants are without remedy unless a re-sale can be effected.

Disborough and Hutchings, two of the defendants, have answered the bill; and although their answer is not altogether full, they deny in express terms the charges of collusion, or that they purchased for the benefit of Hassert. They allege, that they were severally the creditors of Hassert, and had no means of saving themselves but by purchasing property at such prices as would yield them a profit. They further allege, that the sale was regularly advertised according to law; and deny that the sale was without the knowledge of the complainants: on the contrary, they insist that the complainants were notified of the sale, and that persons connected with the bank, and concerned in its affairs, attended the sale. They admit that the personal property purchased by them was not removed, and assign reasons for it, which, though not very satisfactory, are sufficient to repel any presumption of fraud arising from that circumstance alone. This answer was filed in 1825, since which time no single step has been taken on the part of the complainants. A number of depositions have been taken on the part of the defendants who have answered. From these depositions it appears that the sale was an open and fair sale; that notice was given to the complainants or their agents; that during a part of the time Mr. Hardenbergh, the president of the bank, attended; and two of the directors attended the sale of the real property, under the special appointment of the board; that Disborough and Hutchings both stated at the sale, that they were bidding for themselves individually, and on some of the property they bid against each other. The vendue book was offered in evidence by the defendants, and an examination of it must satisfy every one, that much of the personal property was sold at very inadequate prices. But on what ground is the court to interfere in this case? The mere inadequacy of price is not sufficient to avoid a contract or set aside a sale. The fraud and collusion charged in the bill, is denied in terms. The imputations against the sheriff, arising from the alleged want of notice, is removed, and the charge itself disproved. The whole ground of the complainants' equity is then removed. The complainants have been

unfortunate, it is true. They relied on the promises of the defendant in execution, and he deceived them. They next relied upon receiving the money out of the proceeds of the sales, but by permitting the property to be struck off at a sacrifice, although standing by as execution creditors, and of course interested in the amount of the sales, they were again deceived. Under these circumstances, it is not now in the power of this court to render them any assistance. I presume it is the intention of the parties that the merits of the case shall be decided on the pleadings and evidence submitted; and being clearly of opinion, as the matter now stands, that the complainants have failed to establish any claim for equitable relief, I shall order the bill to be dismissed, with costs.

CITED *in Mercereau* v. *Prest*, 2 *Gr. Ch.* 463; *Marlatt* v. *Warwick*, 3 *C. E. Gr.* 111; *Kloepping* v. *Stellmacher*, 6 *C. E. Gr.* 329.

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## JOSEPH QUICK AND OTHERS v. RACHEL QUICK AND OTHERS.

The testator devised as follows: I devise to my son Abraham Quick the remainder of my land in Amwell, &c. "to him the said Abraham during his life time, and if he should die before his wife, she is to have the use and benefit of the said devised land for her support as long as she remains his widow and no longer; and at her decease I devise the same to his heirs, to be divided between them as the law directs when any die intestate. I have devised the last mentioned tract to my son Abraham subject to the following incumbrances, to wit: That he the said Abraham is to pay to my daughter Mary one hundred and fifty pounds, in the following manner, &c.; and he the said Abraham is to pay to my daughter Rosanna, in case she gets married, thirty-seven pounds ten shillings, to get her an outset."—By this devise, the *whole estate* in the devised premises, to wit, the estate for life and the remainders, is charged with the legacies: and the devisee for life having died without paying them, and his estate being exhausted, the amount due on the legacies must be raised out of the land, by sale.

The devisee for life's dying insolvent, before payment of the legacies, the legatees omitting to claim the same of his administrator within the time limited by rule of the orphan's court and a decree of the court barring creditors who had not presented their demands pursuant to the statute; do not affect the claim of the legatees to have the legacies raised out of the lands charged.

Jacob Quick, in and by his last will and testament, dated 8th August, 1808, after devising one part of his farm to his son

Ezekiel, devised the other part as follows: "I devise to my son Abraham Quick all the remainder of my lands, situate in the township of Amwell, (describing it by metes and bounds,) containing one hundred and twenty acres, more or less; to him the said Abraham Quick during his life time; and if he should die before his wife, she is to have the use and benefit of the said devised land for her support as long as she remains his widow, and no longer; and at her the said widow's decease, I devise the same to his heirs, to be equally divided between them as the law directs when any die intestate. I have devised the last mentioned tract of land to my son Abraham Quick, subject to the following incumbrances, to wit: That he the said Abraham Quick is to pay to my daughter Mary Ewing one hundred and fifty pounds, in the manner following, to wit; one hundred pounds of it four years next after my decease, and the remaining sum of fifty pounds to be paid the next year after. And he the said Abraham is to pay my daughter Rosanna Quick, in case she gets married, the sum of thirty-seven pounds ten shillings, to get her an outset:" and after giving some pecuniary legacies, appointed his two sons, Ezekiel and Abraham, executors. The testator died in 1816. Upon his death Abraham Quick, the devisee, took possession of the devised premises, and occupied them till 1822, when he died intestate, leaving the two legacies, to Mary Ewing and Rosanna Quick, (who had intermarried with Joseph Quick,) unpaid; and leaving his widow, Rachel Quick, and several children, the defendants in this case, living. Administration of his estate was granted to David Manners; who, finding the estate likely to prove insolvent, applied to the orphans' court, and under their direction proceeded to make a settlement and distribution thereof, according to the provisions of the act directing the distribution of the estates of persons who die insolvent. The claims of the legatees were not presented to the administrator, or any part of the legacies paid out of the estate. After the estate was distributed, the complainants filed their bill against the widow, heirs and administrator, to have their legacies raised and paid out of the lands devised. The bill was taken, *pro confesso*, against the widow. The children, being minors, put in the general answer by their guardian. David Manners, the adminis-

trator of Abraham Quick, deceased, in his answer, admits the devise, &c., but alleges that Abraham Quick died insolvent; and sets forth that, having disposed of the personal estate of the said decedent, and the same appearing to be insufficient to pay his debts, he, the said administrator, applied to the orphan's court of the county of Hunterdon, in May term, 1823, for a rule to show cause why the real estate of the said Abraham Quick should not be sold for the payment of his debts. That in October term, 1823, the court made an order for the sale of the real estate. That by virtue of the said order, he, the said administrator, sold all the real estate of said deceased; and his real and personal estate appearing to be insufficient to pay his debts, the said court, in May, 1823, made an order, directing him the said administrator to give notice to the creditors of the said intestate's estate, to exhibit their claims and demands against the estate of the said Abraham Quick, deceased, to the said administrator, under oath or affirmation, within six months from the date of the order, by setting up copies of said order, and advertising the same, pursuant to the statute; which notice was accordingly given. That in the term of February, 1824, the said rule was made absolute, and it was decreed by the said court, that all creditors having claims or demands against the said estate, and who had neglected to present them to the said administrator within the time so limited, should be barred from prosecuting for or recovering the same from the administrator, or coming in for a dividend of said estate. The said defendant, in his answer, farther alleges that the complainants, or either of them, or any person on their behalf, did not present to the said administrator, under oath or affirmation, their claims or demands against the estate of the said Abraham Quick, deceased, for the said legacies bequeathed them by the will of the said Jacob Quick, deceased, in the bill of complaint mentioned, within the time so limited by the said rule of the orphan's court; and the defendant insists, that by the laws of this state the complainants are for ever barred from recovering the said demands against him as administrator, or from coming in for a dividend of the said decedent's estate. The answer farther states, that the said defendant, as administrator of the said deceased, made sale of all his real and personal estate, and made report to the orphan's court of

the proceeds of the sale thereof, and of the amount of debts and claims against the said decedent's estate presented to the administrator, under oath or affirmation, within the time limited by said rule; whereby it appeared that the said estate was insufficient to pay the said debts, and thereupon a dividend of eighty cents to the dollar was decreed by the court to be paid to each creditor entitled to distribution; and that all the moneys that have come to the hands of the defendant as administrator of the said deceased (except the amount allowed for commissions and expenses) had been paid out to the creditors whose claims had been regularly presented according to law.

A replication was filed, proofs exhibited, and the case submitted to the court upon the points stated.

*N. Saxton*, for the complainants;

———— contra.

THE CHANCELLOR. The land devised is charged with the legacies. It was not a charge upon the *person* of the devisee merely, or upon *his estate* or interest in the land, but upon the whole estate in the land devised. If Abraham Quick had died before his father, the charge would have remained on the land, in favor of the legatees. His dying afterwards, and before payment, will not defeat the legacies. Where lands were devised to A. and his wife for their lives, remainder to such of the children as should be living at the death of the survivor of them, and to their heirs, A. paying forty pounds to the plaintiff at a certain time; it was decreed that the land be sold for the payment of the money, and then the defendants to have such a proportion of the overplus of the purchase money as was answerable to their interest for life: for the money devised is a charge upon *all the estate*, i. e. the estate for life and the remainders: *Sad* v. *Carter*, *Prec. in Ch.* 27; 2 *Eq. Ca. Ab.* 370. In this case, the personal estate of Abraham Quick, the devisee for life, is exhausted; and the amount due to the complainants, on these legacies, must be raised out of the land, by

sale. Their claim upon the land, for the satisfaction of their legacies, is not affected by Abraham Quick's insolvency, or the proceedings in the orphans' court barring his creditors who had not presented their claims within the time limited.

Let it be referred to a master to take an account of the amount due to the complainants, and ascertain what part of the lands so charged may be sold with the least prejudice to the remainder.

# CASES IN CHANCERY,

OF APRIL TERM, 1830.

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## VAN DERVEER v. TALLMAN ET AL.

Injunction allowed as to defendant in a bill to foreclose, having sold timber standing on the ground; but not as to the purchasers, by name, they not being parties to the bill, and having a right to be heard.

This was a bill filed to foreclose. Before the suit the mortgagor had conveyed to George Hancock in fee, in trust for certain purposes; and the mortgagor and Hancock were made parties, and also certain other persons, claiming to have a lien on the property. Pending the suit, Hancock sold parcels of the wood growing on the premises to Isaac Johnson and several others; and the complainant filed his petition, setting forth the facts of the sale, and alleging that Hancock and the others were committing great waste by cutting down the timber; and praying an injunction against Hancock, and also against the purchasers of the timber and wood growing.

THE CHANCELLOR. An injunction cannot issue against the purchasers by name, they not being parties to the bill. This is in accordance with the general rule. There is one case where a bill was filed against one set of tenants to restrain waste, and they were restrained; another set commenced cutting, and they were injoined, though not parties: but the authorities extend only to tenants. The persons here are purchasers, and have a right to be heard. (*Fellows* v. *Fellows*, 4 *Johnson's Ch. Rep.* 25.)

Injunction allowed as to Hancock; refused as to the purchasers.

*A. Brown*, for complainant.

## COPPER, AND THE EXECUTORS OF CALBRAITH, v. WELLS, HOY, AND OTHERS.

Upon a bill for specific performance of an agreement, that at the expiration of a building lease the buildings and machinery should be valued by three indifferent persons, one to be chosen by each party and the third to be mutually chosen by them, or in case of their disagreement, then by the two who shall have been chosen by the said parties. If one party has made choice of an appraiser and the other refused to choose one, this court cannot compel him to choose one.

If the appraiser chosen by one party, without the concurrence of the other, made an appraisement, it is an ex parte proceeding, irregular and void.

But in such cases, where a specific performance of the agreement has become impossible, or from the nature of the contract cannot be decreed, the party aggrieved is entitled to compensation in damages for the non-performance of the agreement.

There is a distinction between damages arising from the non-performance of a contract, which damages may be partly imaginary, and partly the result of actual or supposed loss or inconvenience; and the damages to which a party is justly entitled for repairs or beneficial and lasting improvements, under the faith of an engagement which is afterwards discovered to be defective, or impossible to be executed by default of the opposite party. In the first case, the damages can be properly assessed only by a jury upon an issue of *quantum damnificatus;* in the last, the compensation may be safely ascertained by an inquiry before a master, or commissioner, or at the discretion of the court an issue may be awarded.

In cases of the latter description the jurisdiction of this court is complete: the party has a clear equity to be restored to the money paid for improvements, which are rendered valueless to him, but are greatly beneficial to the owner of the land.

Executors of a mortgagee, standing in the place of the testator, have an interest in the controversy; the mortgage is in their hands, and they have a right to come into this court, to be satisfied the amount of it, out of the property bound by it, or its proceeds.

If probate was granted without the state, *query?*

The complainants' bill sets forth, that Gideon H. Wells, and Hannah his wife, (who is since deceased,) being seized and possessed of a tract of land in Trenton, through which the Assanpink flows, and which affords an extensive water power for the construction of manufactories, entered into articles of agreement with Hugh Christy and five others, in relation to the establishment of a manufactory on the said stream. The articles bear

date on the 30th March, 1814. Wells and wife, the party of the first part, covenanted and agreed with Christy and others, the party of the second part, that they would furnish the party of the second part with a certain quantity of water, for the purpose of carrying on certain works to be by them erected, and furnish them with a lot of ground, with the privilege of a road for passing and repassing at all times; that these privileges should be enjoyed by the party of the second part for fifteen years from the date of the articles, at the yearly rent of 600 dollars. The party of the second part covenanted and agreed, that they would erect on the lot a suitable stone and brick building for the purpose of a cotton manufactory, and proceed to the manufacturing of cotton as soon as the building and machinery should be completed for that purpose, and would pay the annual rent of 600 dollars; that the machinery should not be removed, but remain in the building as a security for the rent reserved; that at the expiration of the said term of fifteen years, the building and the machinery of every kind shall, if so desired by the party of the second part, be valued by three indifferent persons, one to be chosen by each of the parties, and the third to be mutually chosen by them—or in case of their disagreement, then by the two who shall have been chosen by the said parties; and the said building and improvements shall be paid for by the said party of the first part, agreeably to the said valuation—*or*, the term of the said party of the second part shall be continued for ten years longer, on the same conditions, if the said party of the second part shall request the same; that at the end of the said additional term of ten years, the party of the first part shall be at liberty to prolong the same for ten years more, or to take the buildings and machinery at a valuation, as above provided; that at the end of the second term of ten years, the buildings and machinery of every kind shall be valued, in the mode before stated, and paid for by the party of the first part; that the said instrument was duly acknowledged and recorded; that the said parties of the second part, after acquiring said lease, erected on the premises a large brick building as a cotton factory, procured machinery, and commenced business upon the premises, paying the rent as agreed on; that by sundry mesne conveyances the shares of the said parties of the second part became vested in John Greiner and John Groves—

the former holding five shares, and the latter one share; that a judgment was obtained against the said Greiner and Groves in the supreme court of this state, in September term, 1825, on which an execution afterwards issued, and the right of the said defendants in the said property was sold and conveyed by the sheriff of the county of Burlington to Wm. Haverstick, of Philadelphia, who thereby became the exclusive owner of all the interest and rights of the original lessees; that after Haverstick became owner, he entered into co-partnership with James Hoy in the manufacturing business—he the said Haverstick finding the funds, and the said Hoy devoting his labor and skill—the profits to be equally divided; that on the 29th of May, 1826, Haverstick and Hoy gave a bond to Hector Calbraith, to secure the payment of $5000, and as a collateral security Haverstick executed to the said Calbraith a mortgage on all his right and interest in the said premises; that Calbraith afterwards departed this life, leaving a last will and testament, and leaving Hector Thompson and Stephen Woolston executors thereof. That the partnership between Haverstick and Hoy was afterwards dissolved, and on or about the 5th of March, 1829, Haverstick caused a notice in writing to be served on Gideon H. Wells and Charles M. Wells and Lewis Waln, informing them that he intended to have the said buildings and machinery appraised by three indifferent persons in the manner prescribed in the said agreement, and that he had chosen John Woods on his part for that purpose, and would attend on the premises on the 11th of March, 1829, for the purpose of making the valuation; and the said Wells, &c. were requested to choose a person and unite in the said appraisement; and also, that it was his intention to give up possession of the said premises. That Haverstick and Woods attended, but no person appeared on the other side, and an appraisement was made by Woods alone, the amount of which was $14,337.45.

The bill further states that Haverstick, becoming insolvent, executed to James C. Cooper, one of the plaintiffs, an assignment of all his interest in the said premises and the said lease or agreement, in trust, for certain purposes in the said deed of assignment specified; that Cooper caused to be served on Gideon H. Wells, Charles M. Wells, and Lewis Waln, notices of taking an appraisement and valuation of said property on the 31st day of March,

1829, and of his intention to deliver up on that day the possession of the same; that Cooper attended, but Wells declined making any appointment, and caused the said buildings to be locked up; that he also declines receiving possession; that the rent then due was $226.37½, which Cooper offered to deduct out of the valuation, which was also refused; that the said Hoy is in possession at sufferance under the said Gideon H. Wells, and colludes with him to defeat the rights of the complainants.

It is further shown, that Hannah the wife of Gideon H. Wells, died in 1824, leaving five children, her heirs at law, being also children of Gideon H. Wells; and also a last will and testament, or an appointment in the nature thereof; and that by virtue of a conveyance from Wells and wife, subsequent to the said agreement, and of divers other conveyances subsequent thereto, the legal estate in said premises is now vested in the said Lewis Waln and Charles M. Wells, in fee simple, subject to certain trusts and conditions in the said conveyances specified.

The relief prayed, is, that the said Gideon H. Wells and the assignees and representatives of Hannah Wells, may specifically perform the convenants and stipulations contained in the said lease or agreement, and that the valuation made by the said Woods may be confirmed; or that an estimate of the amount and value of the buildings and machinery be made by a master, or under his direction, and that the amount of such appraisement be decreed to be a lien upon the said premises; that the defendants be decreed to pay the same by some short day, or in default thereof that the same be sold; that the proceeds be appropriated to the satisfaction of the said mortgage debt to Calbraith, and the residue to the said James C. Cooper.

To this bill the defendants, with the exception of James Hoy, have *demurred*, as well for want of equity, as because the said executors of Calbraith have no lawful right to sue. This cause was submitted to the court upon the pleadings, in the term of January last.

*G. Wood*, for the complainants.

*G. D. Wall*, for the defendants.

THE CHANCELLOR. Have the complainants exhibited a proper case for equitable relief?

The complainants represent those who made the original agreement with Wells and wife, in 1814. It is manifest that on the strength of that agreement, expensive buildings were constructed, and large sums of money expended in purchasing machinery necessary for the manufacturing business. The fifteen years mentioned in the contract ended on the 30th of March, 1829; the lease then expired by its own limitation, unless the lessee requested a continuance. In this case such request was not made; on the contrary, the party then in interest and representing the original lessees, gave notice to those having the legal estate, that the possession would be given up, and that a valuation was desired, of the building and machinery; the complainant having chosen one appraiser, according to the stipulation in the lease. The defendants refused to receive the possession, or to unite in the appraisement. The rent (with the exception of a small part of it) was paid; and it was offered that this should be allowed out of the valuation.

As to the first species of relief prayed for: can the court decree a specific performance? Clearly not. The principle is well settled that the court has no power to compel a party to appoint an arbitrator, and of course that a specific performance cannot be decreed. In *Mitchell* v. *Harris*, 2 *Ves. jr.* 129, Lord Eldon inquired whether there was any instance of a bill to compel parties to name arbitrators; and in *Street* v. *Rigby*, 6 *Ves. jr.* 818, the same chancellor remarks, "There is considerable weight as evidence of what the law is, in the circumstance that no instance is to be found of a decree for specific performance to name arbitrators, or that any discussion upon it has taken place, in experience, for the last twenty-five years." The same principle is recognized in *Nichols* v. *Chalie*, 14 *Ves. jr.* 270; *Waters* v. *Taylor*, 15 *Ves. jr.* 10; *Wilkes* v. *Davis*, 3 *Meriv.* 509; and has been recently confirmed by this court in the late case of *Newbold and others* v. *Pearson*.

It appears however, that the complainant had a valuation made of the buildings and machinery by one Woods, after a notice given to the other party to choose an appraiser. The property was appraised at $14,337.45, and the bill seeks to have this appraisement confirmed. It is manifest that this appraisement was not made

in the manner prescribed by the article of agreement. It is an ex parte proceeding, altogether irregular and void, and can furnish no ground for a decree of this court. The court can afford no aid in that way.

Is then the complainant, Copper, without a remedy? Shall a refusal on the part of the defendants to comply with the agreement, and name an arbitrator to adjust and settle the amount justly due for the improvements and property of the complainant, have the effect of securing to him the benefit of such property, and leaving the complainant without redress? Such cannot be the law. Upon broad principles of justice, Copper, as the representative of Haverstick, is entitled to a remuneration commensurate with the value of the improvements, subject to the mortgage incumbrance. It cannot be pretended that Wells can compel Copper, the complainant, to extend the lease against his will, much less that he has a right to the building and machinery without making satisfaction.

If the complainant has a remedy, is it in this court?

It sometimes happens in cases of contracts, which from their nature and on general principles may be decreed to be specifically performed, that owing to some circumstances such performance has become impossible; as where after a contract for the sale and purchase of land, the vender sells the property to a bona fide purchaser, without notice, and for a valuable consideration, a specific performance will not be decreed, for such decree would be nugatory. In such cases, as well as in the present, when from the very nature of the contract, a specific performance cannot be decreed, the party aggrieved is entitled to compensation or to damages for the non-performance of the agreement, either in a court of law or of equity. Which is the proper tribunal, is a fair question for consideration.

It is true, in general, that a party whose rights have been injured by the non-performance of a lawful contract, has an ample remedy at law, and must seek redress in the common law courts. The old doctrine was, that he might have his election to resort either to a court of law for damages, or to a court of equity for a specific performance. And Sir William Grant, the master of the rolls, in *Greenaway* v. *Adams*, 12 *Ves. jr.* 401, remarks, that if a court of equity does not see fit to decree a specific performance, or finds that a contract cannot be specifically performed either way, he

would have thought, there was an end to its jurisdiction; for in the one case, the court does not see reason to exercise the jurisdiction, in the other it finds no room for its exercise. It seems, he adds, that the consequence ought to be that the party must seek his remedy at law. It is equally true, however, that the ancient landmarks between the two courts have been in this particular somewhat shaken; and the result has been favorable to the enlargement of the jurisdiction of this court.

The case of *Denton* v. *Stewart*, decided by Lord Kenyon, master of the rolls, in 1786, 1 *Cox*, 258, is a leading case in favor of such jurisdiction. There the plaintiff had furnished and repaired the house, and the defendant stated in his answer, that he had actually sold the house to another person for a full valuable consideration; it was referred to a master to inquire what damages the plaintiff had sustained by the defendant's not peforming his agreement, and what the master should find to be the damage in such respect, together with the costs of suit, should be paid by the defendant to the plaintiff. In *Greenaway* v. *Adams*, above cited, the master of the rolls, though he had strong doubts, yielded those doubts to the authority of Lord Kenyon, and made precisely the same decree.

The next case was *Gwillim* v. *Stone*, 14 *Ves. jr.* 128. The bill prayed that a contract entered into by the plaintiff for a purchase from the defendant might be delivered up, on the ground of the defective title of the defendant; and that compensation might be made to the plaintiff, for the loss he had sustained by the defendant's failure to carry the contract into execution. The master's report was against the title of the defendant, but the master of the rolls declined an order of reference to a master to inquire as to the injury sustained, and remarked that he had some doubt upon the principle laid down in *Denton* v. *Stewart*. In *Todd* v. *Gre*, 17 *Ves. jr.* 274, Lord Eldon held, that a bill for a specific performance, praying in the alternative an issue or inquiry with a view to damages, was not the course of proceeding in equity, *except in very special cases*, and said that the case of *Denton* v. *Stewart* could not be supported according to the principles of the court, unless it was on this distinction, that the defendant had, pending the suit, put it out of his power to perform the agreement. In a late case, *Blore* v. *Sutton*, 3 *Meriv.* 247, the competency of a court of equity to give damages for the non-performance of an agree-

ment, was said by Lord Eldon to have been questioned by very high authorities, notwithstanding the case of *Denton* v. *Stewart.* In the case before him he refused a decree which would be merely for damages, and not a compensation for the benefit the estate had received.

The case of *Denton* v. *Stewart* has been recognized in this country by Chancellor Kent in *Phillips* v. *Thompson*, 1 *John. C. R.* 131. The bill there was for a specific performance. This relief was denied, because the contract was void under the statute of frauds, but the complainant having sustained damages by the cutting of the canal and lowering his dam, an issue of quantum damnificatus was awarded; the chancellor remarking he was apprehensive the complainant would be remediless without the aid of the court. And in *Parkhurst* v. *Van Cortlandt*, 1 *John. C. R.* 274, the court ordered a reference to a master. In that case the plaintiff had made permanent improvements on the property, and the execution of the contract was resisted on the ground of its being within the statute of frauds.

In *Newbold and others* v. *Pearson*, in this court, a reference was lately ordered where permanent improvements had been made and a specific performance had become impossible.

Taking all the cases together, the law can scarcely be considered as entirely settled. I should not feel willing to go the length of saying that in any instance a party might file a bill in the alternative, praying a specific execution of the contract, and if that could not be granted, then an issue or inquiry to ascertain the damages; that would be introducing into this court suits, over the subject matter of which the courts of common law have ample jurisdiction, and can afford ample relief. But there is a wide distinction between mere damages arising from the non-performance of a contract, which damages may be partly imaginary and partly the result of actual or supposed inconvenience or loss, and the compensation to which a party is justly entitled for repairs or beneficial and lasting improvements made to property, under the faith of an engagement, which is afterwards discovered to be defective in itself, or impossible to be executed by the default of the opposite party. In the one case, the damages can be properly assessed only by a jury, upon an issue of *quantum damnificatus;* in the other, the compensation may be safely ascer-

tained by an inquiry before a master or commissioners, or at the discretion of the court an issue may be awarded. In cases of the latter description the jurisdiction of this court is complete. The party has a clear equity to be restored to the money paid for improvements which are rendered valueless to him, but greatly beneficial to the owner of the land. It was so held by the lord keeper in *Hollis* v. *Edwards & al.* 1 *Ves.* 159. There the plaintiff, in consequence of a parol agreement for the execution of a lease, had expended large sums on the premises. The statute of frauds was pleaded, and successfully; but no doubt was expressed as to the right of recovering in this court the money expended for improvements. This case does not appear to have been even called in question, and the one before the court is clearly within its principles.

If I had doubts as to the plaintiff's remedy, I should be inclined to overcome them and give him aid, on the ground that he can only have adequate relief in this court. The improvements put on the premises are permanent and valuable, and it is right that they should be bound for the reimbursement of the complainant. The claim is in equity a lien on the property, and unless it is so considered the complainant may be without remedy. Before a judgment at law could be obtained, such might be the situation of the property and parties, as that the judgment would be altogether nugatory, and the clear right of the complainant defeated.

The second ground of demurrer, to wit, that the executors of Calbraith have no legal right to come into this court to sue as complainants, is not exactly understood by the court. Standing in place of their testator, they have an interest in the controversy. The mortgage of the testator is in their hands, and they have a right to be satisfied the amount of it out of the property bound by it, or out of the proceeds of said property. Where the letters testamentary were issued, does not appear on the face of the bill. If it shall turn out that they were granted without the state, the objection may be taken at another stage of the cause.

Let the demurrer be overruled with costs.

CITED *in Berry* v. *Van Winkle's Ex'r*, 1 *Gr. Ch.* 276; *Conover* v. *Smith*, 2 *Gr. Ch.* 54–58.

## IN THE CASE OF PETER COVENHOVEN, A LUNATIC.

On an inquisition returned finding a person lunatic and of unsound mind at that time, and for five years last past, a third person representing himself to be the attorney in fact of the alleged lunatic, under a letter of attorney executed within that period, and stating that he had transacted business of the alleged lunatic to a considerable amount, and advertised and sold part of his real estate, the alleged lunatic himself having executed and delivered the deeds therefor; and that, by the finding of the inquisition, he, the attorney, is endangered in the contracts entered into by virtue of said letter of attorney—cannot be heard upon petition by him praying that the inquisition may be quashed, or a new commission issued, or a traverse ordered; he is not interested as a purchaser whose title might be affected by the inquisition, neither is he liable as vendor, the lunatic himself having executed the deeds; he has no interest which entitles him to be heard.

A stranger cannot sue out a commission in the nature of a writ *de lunatico inquirendo*, nor can he make himself party to it by application to this court; he has no right to interfere in a proceeding of this nature. The party who seeks to quash the inquisition or traverse the finding of the jury, should have an actual interest, legal or equitable, which would be endangered by the finding of the jury, and that should be manifested to the court; in such cases the application will be granted.

A person found lunatic may appear and traverse the inquisition by attorney, but an idiot must appear before the court in person.

The petition for a commission of lunacy should be accompanied by affidavits, *evincing the lunacy of the party;* this may be, by setting forth the unsound state of the mind of the person against whom the commission is prayed, and mentioning such instances of incoherent conduct or expression, as prove him unfit to continue in the management of his own affairs; so an affidavit setting forth no particular act or expression of the alleged lunatic, from which the court could form an opinion of the propriety of granting the commission, but stating expressly, that for the space of six or seven years last past, the deponent has, by frequently observing the behavior and actions of the alleged lunatic, looked upon him to be deprived of his reason and understanding, so as to be incapable of the government of himself, and incompetent to manage his own affairs; is sufficient, after inquisition returned, to sustain it as regularly issued.

It is not necessary that the inquest should be held at the dwelling house of the lunatic; if held at a suitable place in the neighborhood, not so remote as to induce the suspicion of unfair practice, or to preclude the jury from inspecting the lunatic, it is sufficient: in this case the inquisition was held at a public house seven miles distant, and the jury and two of the commissioners went to the dwelling house of the lunatic and inspected him, and it was considered to be within the rule.

It is not necessary that the evidence taken before the jury should be reduced to writing and returned with the inquisition.

Case of Covenhoven.

Where the lunacy at the time of the inquisition found is not questioned, but a traverse is sought to vary the time at which the lunacy commenced, to exempt from its operation a will executed by the lunatic within the period of the lunacy, with respect to which the inquisition is not conclusive, it will not be granted.

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On the 16th of February, 1830, a commission in the nature of a writ *de lunatico inquirendo*, issued out of this court, directed to Robert McChesney, George Davis, and George Morris, esquires, directing them to inquire into the alleged lunacy of Peter Covenhoven. On the 4th of March the commission was executed, and the jury found that the said Peter Covenhoven was, at the time of taking the inquisition, a lunatic and of unsound mind, and that he had been in the same state of lunacy for the space of five years then last past.

On the 9th of March, Peter Covenhoven, the alleged lunatic, filed in this court a petition, setting forth that the inquisition was taken at least seven miles from his residence, that the jurors found against the weight of evidence, and that he had been informed that the proceedings were subject to several objections. The petition prayed that a new commission might issue, or that he might be allowed to traverse the inquisition already found.

On the same day Peter Gulick filed his petition, setting forth that on the 9th of May, 1825, the alleged lunatic, Peter Covenhoven, constituted him his attorney in fact; that he has since that time transacted all his business, made his contracts, and sold a part of his real estate; that by reason of the finding of the jury he is greatly endangered in the matters transacted by him under the said letter of attorney; that the commission was executed seven miles from the residence of the said Peter Covenhoven, and that the precept to summon the jury was executed by one James Mount, and not by the sheriff of the county; that proper and competent evidence was overruled or improper evidence received by the commissioners; that the inquisition is against the opinion of eight of the jurors, and against the weight of evidence. This petition prays that the inquisition may be quashed, or that a new commission may issue, or a traverse be ordered.

This case was submitted to the court in April term last.

*J. S. Green*, for the petitioners.

*G. Wood*, contra, for confirming the inquisition.

THE CHANCELLOR. The first question which presents itself, is, whether the petitioners have a right to come before the court and ask relief, and if they have, whether they are properly before the court. And first as it regards the application of Peter Gulick. His claims to be heard in this matter are, that he is the agent and attorney in fact of Peter Covenhoven, and has acted as such from the 9th day of May, 1825, under a regular letter of attorney of that date; that he has transacted the business of the said Peter Covenhoven to a considerable amount, and has advertised and sold a part of the lands—he, the said Peter Covenhoven, executing the deeds therefor; that by the finding of the inquisition, that the said Peter Covenhoven was a lunatic of a period prior to the date of the letter of attorney, he is greatly endangered in the several transactions, contracts and agreements, made and entered into by virtue of the said letter of attorney.

It is clear that a stranger has no right to interfere in a proceeding of this nature. He can neither sue out a commission, nor can he make himself a party to it by any application he may make to this court. I take it to be equally clear, that when a person has actual interests either equitable or legal, which are affected by the inquisition, he may apply to this court for relief. In England, this right is generally considered to be founded on the statute of 2*d Edw.* 6, *c.* 8, which provides, that if any are untruly found lunatic or idiot, *any person or persons grieved* by any such office or inquisition, shall or may have his or their traverse to the same, &c. That statute has never been re-enacted in this state, and I am not aware that it was in use in the colony previous to the revolution, so as to be considered part of the law in force at the time of adopting the constitution: nor do I consider it material; the right may exist independent of any statute. Proceedings upon an inquisition of lunacy are ex parte; and although they are not conclusive as to the rights of third persons, yet, when those rights are affected by the inquisition, it is equitable and just that the party aggrieved should have an opportunity of being heard in such mode as may best comport with justice and the rights of all interested. It may be of the utmost importance to alienees and others holding interests under a person who is found to be a lunatic, to have the question definitely and speedily settled. The inquisition is always *prima facie* evidence, and it would be inconvenient and unjust

that those whose fortunes might depend on the issue of a full investigation, should be compelled to wait in uncertainty, with a cloud hanging over them, until the death of witnesses and the loss of testimony rendered defence hopeless. But the party who seeks to quash the inquisition, or traverse the finding of the jury, should have an actual interest, either legal or equitable, and that should be manifested to the court. What in this case is the interest of this petitioner? He has acted as the agent of Peter Covenhoven, under a power of attorney, and as such agent has transacted business to considerable amount. In what situation that business is at this time, does not appear. It is not stated that any settlements have taken place between the petitioner and the alleged lunatic which will be invalidated, or that in consequence of such settlements, vouchers have been destroyed or cancelled, so as to render it impracticable for this agent to account with any one save the alleged lunatic himself. If the accounts of this agency are still unsettled, there is no reason shown or assigned, why such accounts may not be as fairly and equitably adjusted with a committee or guardian as with Peter Covenhoven. I do not see that the fact of Gulick having transacted business for Peter Covenhoven to a considerable amount, even under a power of attorney, which, according to the finding of the jury, was executed after Covenhoven became of unsound mind, can of itself create such an interest as to authorize an interference on his part. But again, he states that he has advertised and sold part of the lands of Peter Covenhoven to different persons, he, the said Peter Covenhoven, having executed the deeds therefor. If the purchasers were before the court on petition to be heard, alleging that their possessions and titles were jeoparded by this ex parte inquisition, it would present a very different case, and might be a proper one for relief. But Gulick is not a purchaser. Is he the vendor? He advertised and sold; but on his own showing it appears that the purchasers were willing to take the deeds from Peter Covenhoven himself. They trusted to his personal covenants and warranty, and so far from being dissatisfied with the proceedings lately had, they have caused to be presented to the court, rather informally it is true, a written request that the inquisition might not be disturbed on the ground of their purchase. How then Gulick is to be endangered, as he alleges, in the several transactions, contracts and agreements made and entered into by

virtue of the said letter of attorney, is not perceived by the court.

In the case *ex parte Roberts*, 3 *Atk.* 5 and 308, it is laid down by Lord Hardwicke, that the alienee of the lunatic may traverse the inquisition, but he shall be bound by the traverse. In *ex parte Morley*, Lord Rosslyn held the same doctrine; and in *ex parte Hale*, 7 *Ves. jr.* 261, Lord Eldon held that a *bona fide* owner in equity of two advowsons under contract might traverse an inquisition, finding that the party with whom he contracted had been a lunatic ten years before. In *ex parte Ward*, 6 *Ves.* 579, the same chancellor being asked to dismiss an application to traverse an inquisition on the ground that it was made by an entire stranger without any interest, rather declined expressing any positive opinion; but admitted that such a case was not within his recollection. On the other hand, Lord Thurlow, in the matter of *Fust*, 2 *Cox*, 418, denied a traverse to the husband of the alleged lunatic, there being circumstances connected with the case that rendered the validity of the marriage doubtful. It was well remarked by the court in that case, that great care should be taken that the general object of the proceedings under a commission should not be disappointed by such application. Taking all the cases together, it is fairly to be inferred, as I think, that applications on the part of third persons in matters of this nature are not encouraged, yet that they will be listened to and granted when actual *bona fide* interests and rights are endangered. Considering as I do, that Peter Gulick has not placed himself in this situation before the court, his petition must be dismissed; and in making this order, it is a matter of satisfaction to know, that if I should have mistaken the law upon the subject, the rights of the petitioner are not concluded, and also, that as to him the inquisition was not in fact an *ex parte* proceeding, but that he attended before the jury and there had the benefit of witnesses and counsel.

To the petition presented by Peter Covenhoven, the alleged lunatic, it is objected that he cannot appear by attorney, but must appear in his own proper person before the court, so that the court may judge whether he is able to present a petition. This objection appears to me not well taken. In *ex parte Roberts*, 3 *Atk.* 5, *Smithie's case in* 1728 is referred to; it was a motion for leave to traverse by attorney, and was opposed on the ground that the tra-

verse must be in propria persona: on searching precedents many cases were found where a lunatic had so traversed, but none in which the same privilege had been accorded to an idiot; and that being the case of an idiot, it was accordingly ordered that she appear in person. In *ex parte Cragg*, and *ex parte Ferne*, 5 *Ves. jr.* the wife who had been found a lunatic, joined with her husband in a petition for a traverse of the inquisition, and it was granted as being matter of right under the statute of Edward. In *Windell's case*, 1 *John. C. R.* 600, a traverse was ordered on the petition of the lunatic, without his being brought into court for inspection. In 1 *Collinson on idiots*, 171—2, the English cases are all collected, and the result of them is, that an idiot must appear in person, but a lunatic may appear by attorney. The reason of the distinction, as given by Collinson is, that it was supposed idiocy might be discerned. I can see no use or propriety in bringing the lunatic before the court at this stage of the proceedings, merely to judge of his capacity to present a petition. No other end could be answered by it; for if upon such inspection the court should suppose there was no foundation for the finding, it would have no power to set it aside. The testimony of respectable persons, who have long known the lunatic, and been in the habit of noticing the movements of his mind, or of physicians who have been accustomed to watch the symptoms of the most distressing of all human maladies, can scarcely fail to be more satisfactory than an inspection by the court. Considering then the application properly before the court, let us inquire into the ground of the complaint. And first, the petitioner seeks to *quash* the inquisition on the ground of irregularity.

He contends that the affidavits on which the commission issued are insufficient, and not within the rule of the court. The general rule on this subject is, that the petition should be accompanied by affidavits setting forth the unsound state of mind of the person against whom the commission is desired, and mentioning such instances of incoherent conduct or expression as prove him unfit to continue in the management of his affairs, 2 *Collins.* 151. In 2 *Madd. Chy.* 569, it is said the petition must be accompanied by affidavits *evincing the lunacy of the party;* and this is the language of our rule of 1817. The court ought, in all cases, to be satisfied of the propriety of granting the commission; and to

be satisfied, too, in the mode prescribed by its own rule. One of the affidavits in the present case does not, perhaps, come quite up to the letter of the rule. It sets forth no particular act or expression of the alleged lunatic, from which the court might be enabled to form some opinion of the propriety of granting the application; but the deponent swears expressly, that for the space of six or seven years last past, he has, by frequently observing the behavior, words and actions, of the said Peter Covenhoven, looked upon him to be deprived of his reason and understanding, so as to be incapable of the government of himself, and incompetent to manage his affairs. The practice under our rule has not been uniform. Some have considered that the affidavits, in order to evince the lunacy of the party, should set forth particular instances of incoherent conduct or expressions; while others have deemed it an unnecessary formality. No evil has ever resulted from this laxity of construction. I incline to think the affidavits are sufficient, as being within the spirit of the rule, and according to the general practice of the court; and if they were not, I should feel unwilling at this stage of the proceedings to quash an inquisition by which the affidavits themselves are entirely confirmed.

Again, it is contended, that the inquest should have been held at the house of the lunatic. It appears that it was held at a public house about seven miles distant, and that the jury and two of the commissioners went to the house of the lunatic, and there inspected him. The cases adduced in favor of this proposition do not support it: it is not the practice, neither is it the law. A commission may issue against a person who is abroad and beyond seas: *Ex parte Southcot*, 2 *Ves. sen.* 401: but it must be executed in the place where he formerly resided. In that case Lord Hardwick is not understood by the court as saying, that the commission must be executed at the mansion house; but that the mansion house shall determine the place of residence, and wherever the residence is, in that county the commission must be executed. So he was understood by Lord Eldon in *Baker's case*, 19 *Ves.* 340; (better reported in *Coop.* 205.) He notices with approbation the dictum of Lord Hardwick; but instead of ordering the commission in that case to be executed at the mansion house of the lunatic, the order was that it should be executed in Devonshire, which was the county where the mansion house was situated. In 2 *Collins. on idiots and lunatics*, 163, there is the

form of a precept to the sheriff to summon a jury to come before the commissioners to inquire of the lunacy of *A. B.* The sheriff is directed to convene the jury at the house of Martha Briston, situated at Hackney, in the parish of Hackney, in the county of Middlesex, and known by the name of the *Mermaid tavern;* to inquire whether A. B. residing at Whitmore house, in the parish of Hackney, in the county of Middlesex, be a lunatic or not; evidently showing that the inquisition was not taken at the mansion house. There is great propriety in having the commission executed near the place of actual residence. The jury and commissioners should have it in their power to inspect the lunatic if they should see fit to require it, and the rights of all parties are better subserved by an investigation in the neighborhood than elsewhere; but there is no necessity that the inquest should be held at the dwelling house of the lunatic. It may ofttimes be inconvenient, and sometimes improper. If it is held at a suitable place, not so remote as to induce the suspicion of unfair practice, or to preclude the jury from an inspection of the lunatic, it is sufficient. The case now before the court is within this rule, and the objection taken on this ground cannot be supported. Nor is there any thing in the ground taken by the counsel of the lunatic, that the evidence before the jury was not reduced to writing and returned with the inquisition. The practice as well in England as in this country is different, and I do not know of any instance where it has been done. On a careful consideration of all the reasons assigned for quashing the proceedings, I am of opinion that they are not sufficient, and that the prayer of the petitioner in that behalf cannot be granted.

The only question that remains is, whether Peter Covenhoven, the alleged lunatic, shall be allowed to traverse the inquisition. This must depend on the sound discretion of the court, under all the circumstances.

It is not pretended by any one that Peter Covenhoven was not at the time of taking the inquisition of unsound mind, and incompetent to the management of himself and property. The petitioner himself does not allege it; nothing of the kind is hinted at in the depositions of Mr. Alexander or Mr. Morford. The difficulty appears to be this, that in the month of August, 1825, Peter Covenhoven executed a last will and testament; whereas by the inquisition it is found that as early as March, 1825, he was of unsound mind;

and the object is to get rid of that part of the finding which might have a tendency to invalidate the will. Alexander and Morford both state that they were subscribing witnesses to the will; and Mr. Alexander testifies, that at that time he did not consider him a lunatic. Mr. Morford states, that he considered him of "good and disposing mind and memory:" and under those impressions they attested the will. If evidence had been adduced before the court, to raise a reasonable doubt of the man's being a lunatic at the time of the inquisition taken, I should feel willing to order a traverse. No man should be deprived of his liberty and property upon the ground of incapacity to manage his concerns, until the fact is established to the satisfaction of every intelligent mind. But, the only effect of a traverse in this case, would be a contestation about the period when the lunacy or unsoundness of mind commenced. And the question may well be asked, *Cui bono?* Would it restore Peter Covenhoven to his liberty or property? Would the legatees or devisees under the will be bound by it, if the second finding should be like the first? If the first finding should be set aside in this respect, would it prevent the necessity of proving the will, and thereby avoid litigation at that period, whenever it may happen? If either of these results would follow, the path of duty would be plain, and the court would take pleasure in pursuing a course that would terminate all difficulties. As it is, I do not feel myself at liberty to put the estate of the lunatic to the expense of a traverse, which can be of no benefit to the lunatic himself, *and which the court has no power to make conclusive on the rights of others.* It is worthy of remark, too, that all the children and family of the lunatic, who would most likely be interested in sustaining the will, are satisfied with the inquisition. If strangers should claim under the will, their rights are not concluded. The inquisition is competent evidence, it is true; but the whole question is open; and when it shall be considered that the jury have gone back for a period of five years; that some of them did not concur in the finding, and that the persons who may then claim had no opportunity of being present at the taking of the inquisition, and having no existing rights, were consequently not entitled to a traverse, the evidence furnished by the inquisition itself will have but little weight before an intelligent tribunal.

Let the inquisition be confirmed.

CITED *in Matter of Dey*, 1 *Stockt.* 183; *Yauger* v. *Skinner*, 1 *McCar.* 395; *Matter of Child*, 1 *C. E. Gr.* 499.

# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

# STATE OF NEW-JERSEY,

JULY TERM, 1830.

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## CAMMANN v. EXECUTOR OF TRAPHAGAN.

On a bill for injunction and relief against a verdict and judgment at law, and plea of the judgment in bar supported by answer; there being no replication filed, the plea, on argument, must be considered true.

As to all matters within the complainant's knowledge at the time the trial took place, defence should have been made at law, and a plea of the judgment at law is a good defence to a bill in this court.

The absence of the complainant and his engagements in business, not having been deemed sufficient ground for putting off, or granting a new trial, the decision at law is final.

Matters of defence, having come to the complainant's knowledge since the trial at law, are proper grounds for granting an injunction and requiring discovery.

But these matters, charged to be within the knowledge of the defendant, who was plaintiff at law, being denied by his answer; the plea of the judgment allowed, with costs.

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The bill set forth, that Augustus F. Cammann, the complainant, and Henry Traphagan, deceased, had dealings together; that several promissory notes were given by the complainant to the deceased; upon two of which notes, and a book account, the complainant was prosecuted at law by the defendant, David P. Traphagan, as executor of the said deceased, and a verdict and judgment obtained against the complainant, who was then absent on business. That he had, as he alleges, a defence; had

made some preparation for trial; and that owing to reasons which are set forth in the bill, a defence was not made; that afterwards a rule to show cause was obtained and argued, and a new trial refused by the court; that upon said judgment execution issued, and subsequently, proceedings were commenced against his bail. The bill sets forth some matters before the trial at law, and charges that the deceased had informed the defendant, that the two notes in question were paid and settled by the complainant, or in some way arranged; and that since the trial of the said cause the complainant had heard that such matter was within the knowledge of the defendant; and prays for discovery, relief, and an injunction.

The defendant pleads in bar the verdict, judgment and proceedings at law; and avers in his plea, and repeats in his answer accompanying his plea, that he had no knowledge respecting the said notes and book account, or of the dealings and transactions between the complainant and the testator in relation thereto, until after the death of the testator, and he became the executor of his last will and testament. And he denies that the testator ever disclosed to him that the said demands on which the said suit at law was brought, or any part thereof, were paid or settled, or arranged in any way. And says that he caused said suit at law to be commenced and prosecuted, and that he exhibited his evidence in said suit before the jury, and obtained the said verdict and judgment thereon, merely in discharge of his duty as such executor, and under the full conviction that the claim aforesaid was just and correct.

The plea in this case was set down for argument. The chancellor having been the attorney for the complainant in the suit at law in the pleadings mentioned, called on Elias Vanarsdalen, esq. one of the masters of this court, according to the practice of the court, to hear the case, and advise the court what order or decree ought to be made. The case was heard before the master, on written arguments, by

*C. L. Hardenberg*, for the complainant, and

*Geo. Wood*, for the defendant.

After inspecting the pleadings and considering the arguments, the master reported to the court his opinion in writing, as follows—which at this term was delivered by

THE CHANCELLOR: The plea, not being denied by a replication, must on the argument be considered as true. As to all the matters of defence at law, within the complainant's knowledge when the trial took place, the master perceives no reason to question the propriety of the defence in this court made by this plea: *Milf.* 206, 3*d ed.*; *Beams, E. Pl.* 197. The court of common pleas of Somerset was a court of competent jurisdiction, and the complainant's defence, as to all matters within his knowledge at the time, ought to have been made in that court. The absence of the complainant and his engagements in business, were not deemed by the court sufficient grounds for putting off the cause, or granting a new trial; and their decision ought to be final. But as to the matter alleged to have come to the complainant's knowledge since the trial at law, this court very properly granted the injunction and required the discovery sought by the bill: 1 *John. C. R.* 98, 322, and cases there cited; 6 *John. C. R.* 87; 1 *John. Ca.* 492, *&c.*; 4 *John. R.* 510; 14 *John. R.* 69; 7 *Cranch. R.* 336; 1 *Wash. R.* 321: And had the defendant admitted what is alleged in this respect, this court might have granted the relief prayed. But, the defendant having denied the matters so charged, the complainant has no ground of equity for relief. The plea of the defendant ought therefore to be allowed, and (according to the statute) with costs.

The plea was accordingly allowed, and at a subsequent term the injunction dissolved and bill dismissed with costs.

SEE *Same Case, Sax.* 230.

## P. MARSELIS AND OTHERS v. THE MORRIS CANAL AND BANKING COMPANY.

The rules of pleading in a court of equity, are not so technical and precise as in courts of law. The powers of the court, and modes of administering relief, authorize and require greater liberality. Still, when principles have by repeated adjudications become settled, it is quite as important that these principles should be preserved in this as any other court.

The court will not permit several plaintiffs to demand by one bill, several matters perfectly distinct and unconnected, against one defendant; nor one plaintiff to demand several matters of distinct natures, against several defendants.

A bill filed by several complainants on behalf of themselves and all others, over whose lands the Morris Canal and Banking Company have made their canal, who shall come in and contribute; charging that the defendants had entered on the complainants' lands without permission, or having purchased or agreed for the same, and excavated their canal and done the complainants great damage, and that the company is insolvent and unable to pay; and praying that an account may be taken and damages awarded to the complainants for the injuries already sustained, and compensation for their lands taken by the company decreed to them, and that an injunction may issue restraining the company from using or occupying the land; is multifarious, and on that account the injunction refused.

Where the demands of several complainants united in the same bill, are entirely distinct and independent; where there is no privity between them; no general right to be established as against the defendant; no common interest in all the complainants, centering in the point in issue in the cause; no general right claimed by the bill and covering the whole case; no rights established in favor of complainants; and no demand made, that the funds of the defendant shall be applied to the payment of the complainants' claims after their adjustment: and where their claims are not in *rem* but in *personam*;— the bill cannot be sustained.

A bill by several to compel the specific performance of a contract for the sale of real estate, in which the complainants hold distinct rights, cannot be sustained.

Peter Marselis, Peter Zeliff, and others, to the number of thirty-eight, claiming to be landholders in the counties of Essex and Bergen, filed their bill against the Morris Canal and Banking Company, in behalf of themselves and all others over whose lands the said company had laid their canal, and who should come in and seek relief by and contribute to the expenses of the suit. The bill charges that the defendants entered on the lands

of the complainants without permission, and without having first purchased or agreed for the lands, and excavated their canal, doing to the said complainants great damage; and that the said company is insolvent and unable to pay. The bill then prays that an account may be taken, and damages awarded to the complainants for the injuries they have already sustained, and that compensation for the lands thus occupied by the company may be decreed to them; and also, that in the mean time an injunction may be issued restraining the company from using or occupying the said lands on which the canal is located, either for the purpose of a canal or for any other purpose.

*March* 16, 1830.—A motion was made for an injunction, according to the prayer of the bill. A number of questions were raised and discussed in the argument, on which no opinion was expressed by the court. Upon the point on which the case turned, it was insisted by the counsel.

*Ph. Dickerson* and *G. Wood*, in support of the motion—That all the complainants are landholders over whose lands the defendants had made their canal, who had all sustained injury by the operations of the company, and had not received the compensation to which they were entitled. That it was proper they should all join in this bill, and have their claims ascertained and settled in the same suit, to prevent multiplicity of suits. That this was allowed in many cases where there was a number of persons having distinct claims against the same person or property; as in cases of creditors, cases concerning rights of fishery, concerning a modus, and others. That the case of the complainants in this bill was within the general principle. That the canal was one single common object, for the use of which the lands of all the complainants had been taken. It was one franchise, held by one person, a corporation: that was one side. On the other side was the complainants, landholders having distinct interests in this common object. That the company might file a bill of peace, against the complainants and all the landholders on the route of the canal: and the rule operated both ways. That the canal was an entirety through its whole extent. And when a dispute existed through the whole length of this entirety, all parties might come in. That

the complainants' having distinct rights of possession and title was of no consequence. All their claims could be adjusted in this suit. That it was better to have thirty-eight issues or assessments under one bill, than thirty-eight separate bills and proceedings under all of them, in some of which the interest might be so inconsiderable as not to justify the expense of separate suits. That the defendants claimed the right to take the lands (subject to compensation) under the franchise granted by their charter, which was one contract. The complainants also claimed under this contract: in it the rights of all parties were involved. The remedy sought by the bill was to enforce the execution of this contract, or obtain redress for its violation; for which purpose the complainants were properly joined. In support of these principles they cited, *Brinkerhoof* v. *Brown*, 6 *John. R.* 139; *Durham* v. *Herbert*, 2 *Atk. R.* 484; *Coop. Eq. Pl.* 158; 11 *Vesey, jr.* 429; 1 *John. C. R.* 349, 447; 2 *Bridgm. Ind.* 572, *s.* 213, *tit. Tithes*, 7; 3 *Anst. R.* 841; 16 *Ves. jr.* 328.

*J. C. Hornblower* and *I. H. Williamson*, contra—Insisted that the bill in this case was multifarious: that there was a misjoinder of parties and causes of action. There were thirty-eight complainants, owning different tracts of land in different places, having distinct and separate interests, complaining of separate trespasses, and praying that the defendants might account to them separately and not jointly. That parties situated as they were could not unite in one bill. If thirty-eight landholders might unite, the whole 250, from the Delaware to the Passaic might, and each complainant's case might require a different answer: some might claim in fee, others in tail, and others have mortgage interests as the foundation of their rights; while the injuries of which they complained were so many separate and distinct trespasses. That the matters complained of in this bill, could not be settled in one issue or trial; there must be thirty-eight distinct *issues* or references. That the complainants had no joint or common interest in the matters in question; no joint evidence could be introduced, and no joint relief given. That the only interest common to all the complainants was, that they all had demands against the same defendant; which was not sufficient. That the cases cited.

on the other side were all of a different character. That the bill in this case was framed on the model of a bill filed by creditors for themselves and others who might come in. The cases were not analogous. That judgment and execution creditors might join in filing a bill for themselves and others, to obtain satisfaction of their demands out of the same property or fund. To enable them to do this, they must have established their claims at law. And in this as in other cases, where one bill might be filed by several complainants, they must all have one right in one subject, and all must be bound by the decree; but in this case the landholders not joined would not be bound. That in the case of a will, the defendants might have distinct claims, but in the same subject. So in the case of rights of fishery. So where there was one general right and privity between the parties, as in the case of a parson and the parishioners. That there must be one general right covering the whole case; and where one general right might be settled in one suit, the parties might join to prevent multiplicity of suits. That the principal cases where parties might join, were suits by devisees, legatees, creditors, stockholders, members of voluntary associations, &c. That in such cases no decree could be made without affecting the rights of all. All having a common interest in the same fund, they were *quasi* parties; and where they were so numerous that all could not be brought before the court, a part might file a bill for the whole. That there was no case where parties might unite in this way, except where the claim of all was against the same fund, the proceedings in *rem*, and where all would be bound by the decree; which was not the case in this instance. That the general principle governing this case was, that several complainants could not demand several distinct and unconnected matters in one bill. That it was not sufficient that they all stood in the same relation to the defendants. That one bill by several purchasers of distinct parcels, for specific performance, could not be sustained, nor a bill by two complainants, against one defendant, for invasion of copy rights, in some of which they were jointly and in others separately interested, because in the latter the claims were distinct. That a bill would not lie against several tenants of a manor, to recover quit-rents, because the matters in difference could not be tried in any one issue.

They cited *Coop. Eq. Pl.* 182; *Beams. Pl. Eq.* 158; *Bunb. R.* 69; 2 *Anst.* 477; 2 *Dick. R.* 677; 1 *Mad. R.* 86; 2 *Ves. jr.* 323, 486; 1 *Bro. C. C.* 200; 2 *Scho. and Lef.* 370.

THE CHANCELLOR. The matter comes before the court on an application for an injunction. A number of objections have been urged against the bill in the shape in which it is presented before the court. And among others, it is objected, that this is not one of the cases in which the complainants may lawfully join in the prosecution of the suit. That their interests, instead of being joint or common, are separate, independent and distinct; and being blended together, the bill is multifarious and therefore bad. This is the first point I propose to consider. The question who are and who are not necessary or proper parties to a bill in equity, and what rights may be brought together in one suit, is one that sometimes occasions perplexity. While care must be taken on the one hand, to bring all proper parties before the court, the same care should be taken on the other, that none are brought there whose rights are not to be in some way bound by the decree that may be made. So too, while the court will, for the sake of avoiding a multiplicity of actions, take cognizance of suits in which many rights, having reference to one subject matter, are united; it must be careful not to admit several plaintiffs to demand by one bill, several matters perfectly distinct and unconnected.

The rules of pleading in a court of equity, are not so technical and precise as in the courts of law. The general powers of this court, and its peculiar modes of administering relief, authorize and require a greater degree of liberality than would be expedient in the courts of common law. Still, when principles have by repeated adjudications become settled, and especially when they are founded in justice and the fitness of things, it is quite as important that those principles should be preserved in this as in any other court.

To ascertain and apply the correct rule to this case, it is necessary to see precisely what the case is. The complainants complain of an injury which they have sustained by the acts of the defendant, in excavating their canal through the lands of complainants. They are several owners, having distinct rights in the several tracts of land through which the canal passes. The inju-

ries sustained by one of them have no necessary or natural connexion with those sustained by another. Admitting the jurisdiction of the court, each of these complainants might sue separately, either in a court of law or equity, without consulting with any other one, and without in the least degree affecting his rights. On the other hand, the suit is brought by all of them against one common defendant. They all complain of injuries similar in their character, and seek a similar relief; and therefore have a common object in view. It is admitted by the bill that all the landholders are not before the court, or have not joined in the suit. But the complainants allege that the suit is brought for the benefit of all who will come in and contribute. Such is the complainants' case. Let us examine some of the leading authorities for the principles that should govern it. In *Bouverie* v. *Prentice*, 1 *Bro. C. C.* 200, Lord Thurlow held, that when a number of persons claim one right, in one subject, one bill may be sustained, to put an end to suits and litigation. That was the case of a bill filed by the lady of a manor against several tenants for quit-rents due, and this method was adopted to prevent multiplicity of suits. But it was not considered as coming within the principle laid down by the court. The Lord Chancellor remarked, that no one issue could try the cause between any two of the parties; and he could not conceive upon what principle two different tenants, of distinct estates, should be brought before him together to hear each other's rights discussed.

In *Ward* v. *The Duke of Northumberland*, 2 *Anst.* 469, the court says, that the cases where unconnected parties may join in a suit, are, where there is one common interest in them all, centering in the point in issue in the cause. In that case a bill was filed against two defendants jointly as executors, and against one of them as heir, for an account under an agreement entered into with the ancestor. It contained matters having no other connexion, than that one of the defendants was a party in them all. Separate demurrers were put in and allowed.

Ld. Redesdale, in *Whaley* v. *Dawson*, 2 *Scho. and Lef.* 367, held this principle; that where there was a general right claimed by the bill covering the whole case, the bill would be good, though the defendants had separate and distinct rights: but if the subjects of the suits were in themselves perfectly distinct, a demurrer

would be sustained. The same rule is recognized in *Saxton* v. *Davis*, 18 *Ves.* 72, and 1 *Vern.* 463, *Hester* v. *Weston*. In the *Mayor of York* v. *Pilkington*, 1 *Atk.* 282, the bill was filed to quiet the plaintiff in a right of fishery, against the defendants, who claimed several rights in the same fishery, and for a discovery and account of the fish they had taken. The bill was demurred to, and Ld. Hardwick at first allowed the demurrer, but after a re-hearing overruled it, and stated it to be no objection that the defendants had separate defences; that the plaintiff claimed a general right to the sole fishery, that extended to all the defendants; and that they might take advantage of their several exceptions or distinct rights. It was held necessary to support the bill, to prevent a multiplicity of suits. In *Coop. Eq. Pl.* 182, this rule is given: "The court will not permit several plaintiffs to demand by one bill, several matters perfectly distinct and unconnected, against one defendant; nor one plaintiff to demand several matters, of distinct natures, against several defendants." And to exemplify the rule, the following case is given, from 2 *Dick.* 677: If an estate was sold in lots to different persons, the purchasers could not join in one bill against the vendor for a specific performance: for each party's case would be distinct, and would depend upon its own peculiar circumstances; and there must be a distinct bill upon each contract, or the bill might be demurred to. Nor could such vendor, on the other hand, file one bill for specific performance against all the purchasers. And Ld. Kenyon, in *Birkley* v. *Presgrave*, 1 *East. R.* 227, says, that he has known the attempt sometimes made, where an estate has been contracted to be sold in parcels to many different persons, to file a bill in the names of all of them to compel specific performance, which has been constantly refused. And he adds, that in general a court of equity will not take cognizance of distinct and separate claims, of different persons, in one suit, though standing in the same relative situation. In the case of *Brinkerhoff* v. *Brown*, 6 *John. C. R.* 139, Chancellor Kent reviews the leading authorities, and comes to this conclusion; that a bill filed against several persons, must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct.

I lay out of view, as altogether inapplicable, all that class of cases which relates to creditors, legatees, &c. where a great many persons are sometimes interested, and the court will permit some to represent the whole, upon the well settled principle, that, though all the persons interested are not made parties, yet there is such a *privity* between them that a complete decree may be made. And in *Coop. Eq. P.* 41, the cases of lords and tenants, in regard to questions of common; of parsons and parishioners, in relation to a modus, and others of a similar nature, are brought into the same class on the ground of privity. These last may with more propriety, perhaps, be classed under that branch of equity that relates to bills of peace. These bills have no affinity with the one now before the court. It is true the legitimate object of them was, to avoid multiplicity of suits; and the ancient and correct practice of the court was, not to interfere until the legal right had first been tried at law, in an individual case; after which, the court would interpose to quiet that right, by injunction: *Jeremy on Eq. Ju.* 344. This is not a bill of peace: and I believe that it has not been contended that a landholder in the county of Morris or Warren, not coming in and making himself a party to this suit, would be in any wise affected by it. I think the principle laid down in *Cooper* is the correct one; that it is fairly deducible from the cases and must govern this, viz: that the court will not permit several plaintiffs to demand by one bill, several matters perfectly distinct and unconnected, against one defendant; nor one plaintiff to demand several matters of distinct natures, against several defendants. And according to this principle I feel constrained to say, that the bill cannot be sustained. There is no kind of privity between these complainants; there is no general right to be established as against this defendant, except the general right, that a wrong doer is liable to answer for his misdeeds to the injured party: which surely does not require to be established by such a proceeding as this. The utmost that can be said, is, that the defendant stands in the same relative position to all these complainants. There is no common interest in them all, centering in the point in issue in the cause; which is the rule in 2 *Anst.* 469. Nor is there any general right claimed by the bill, covering the whole case; which is the principle adopted by Lord Redesdale, *vide ante.* Chancellor Kent's rule is quite as

broad as any authority will warrant; but it is not broad enough for the case now before the court. It requires that a bill against several persons must relate to matters of the same nature, and having a connexion with each other, and *in which all the defendants are more or less concerned, &c.* The case that was then before that learned judge, is the best exposition of his rule, and shows how utterly inapplicable it is to the present one. The plaintiffs were judgment creditors, having claims against an incorporated company, established by law, and not the subject of litigation. The general right claimed by the bill, was a due application of the capital of that company to the payment of their judgments; and that upon the ground of fraud charged in the creation, management and disposition of the capital, in which all the defendants were implicated, though in different degrees. In the case before the court there are no rights established; and what in my view is more important, there is no demand made, that the funds or capital of the company shall be applied to the payment of the complainants' claims after they shall have been adjusted. The claim is one not in *rem*, but in *personam* merely.

It was admitted by one of the complainants' counsel, that the company had a right to take the land under the charter, paying for it a fair compensation. And it was urged that this charter privilege was in the nature of a contract; that under this contract the defendants entered; and that the case presented is one of a contract for the sale of lands, with a part performance on one side. This view of the matter does not obviate the difficulty. The bill is obnoxious to the same objection, whether the demand made by it be considered as arising *ex contractu* or *ex delicto*. It is well settled, that a bill by several to compel the specific performance of a contract for the sale of real estate, in which the complainants hold distinct rights, cannot be sustained. This conclusion renders it unnecessary, and perhaps improper, for me to look into any other parts of the case. On the ground that the bill is multifarious,

The injunction is refused.

THE DUTCH CHURCH AT ACQUACKANONK v. THE SURVIVING EXECUTORS OF ABRAHAM ACKERMAN, DEC'D, AND OTHERS.

On a legacy bequeathed to the widow in lieu of dower, interest allowed after one year from the testator's death, upon the common rule applicable to legacies generally.

The exception, allowing interest from the testator's death on legacies intended as a maintenance, applies only to infant children, and does not extend to the widow.

The allowance of interest on a legacy is not regulated by the fund out of which it is to be paid, whether productive or not.

The widow is excused in declining to make her election when required to do so by the executors, and in not accepting the legacy bequeathed to her in lieu of dower, while a controversy was pending respecting the will of the testator, so far as it affected the real estate with which her rights under the will were in a degree connected: and having afterwards, within the time directed by the court, elected to accept the legacy, she is entitled to interest on it from the expiration of one year after the testator's death.

Abraham Ackerman, on the 28th December, 1827, made and executed his last will and testament, in the presence of three subscribing witnesses; in which, among other things, he devised to his wife $200 in money, some personal property, and a lot of land in fee; and also bequeathed her $2000, to be paid to her out of his estate as soon as conveniently might be, in lieu of her dower. And bequeathed to the minister, elders and deacons of the true Reformed Dutch Church at Acquackanonk $1500; and also one sixth part of all the residue of his estate. The testator died on the 28th January, 1828; the will was proved before the surrogate, and letters testamentary granted to the executors; who collected debts, paid off some of the legacies, had overplus money in hand, called on the widow to elect whether she would claim her dower, or accept the legacy of $2000, given in lieu of it; and in case of her acceptance, offered to pay her the legacy. But, one of the instrumental witnesses to the will being an elder and trustee of the church; and doubts having arisen, whether the church was entitled to the legacy of $1500, and whether the will was duly executed to pass real estate, and the interest of the widow in the lot devised to her might not be affected: she declined making her

election, or receiving the legacy of $2000 in lieu of dower; and the executors declined paying the legacy to the church until the matter should be settled by a competent tribunal. The bill in this case was thereupon filed by the church, against the surviving executors, the widow, legatees and heirs at law of the testator, for the purpose of establishing the will and recovering the legacy of $1500. The widow and executors answered, admitting the facts, and praying the direction of the court. The cause came on in July, 1829, upon bill and answers, and leave was given to the complainants to examine the witnesses to prove the due execution of the will, and a general reference as to debts, legacies, &c., directed. Another hearing was had in October, 1829; whereupon it was decreed, that the will be established, and the trusts thereof performed; and Jane Ackerman, the widow, was directed to signify in writing to the court, within thirty days after being served with a copy of the decree, whether she would claim her dower, or accept the legacy of $2000 in lieu of it; and farther equity and directions reserved. The widow, within the thirty days, (on the 16th December, 1829,) certified to the chancellor her election to accept the legacy in lieu of dower: upon which the executors paid her the $2000; but, as they had before offered to pay, and she had refused to accept it, they declined paying her any interest on it without the direction of the court, and the cause was again set down for farther hearing and direction upon this point.

*J. C. Hornblower*, for the widow, insisted, that the widow was entitled to interest from the death of the husband, by analogy to the case of children, who are entitled to interest for maintenance, notwithstanding a day of payment was fixed; and because it was payable out of land, and intended as a provision for the widow, in lieu of her dower in the testator's real estate, which would have produced a profit; and it was to be presumed the testator intended something equally beneficial. That, if he had died out of possession, she could have demanded dower, and obtained the profits from the time of the demand. That, if she was not entitled to interest from the testator's death, she was entitled to it from the expiration of one year after, upon the general rule regulating the payment of interest on legacies, notwithstanding her delay in making her

election, and refusal to accept the legacy when payment was offered; for which she had a sufficient excuse in the uncertainty that existed concerning the will. That, although the interest was not claimed in her answer, or mentioned in the former arguments or decrees, it might be given under the reservation of "all farther questions," &c. He cited *Lupton* v. *Lupton*, 1 *John. C. R.* 614, 628; *Crocket* v. *Dolby*, 3 *Ves. jr.* 16; *Ingraham* v. *Porsal*, 1 *McCord R.* 94, 8; *Irby* v. *McGray*, 4 *Dessaus. R.* 422; *Glen* v. *Fisher*, 6 *John. C. R.* 33; *Goodyear* v. *Lake*, *Amb. R.* 584; *Campt* v. *Mesin*, 6 *John. C. R.* 22, 3; 2 *Ves. jr.* 164; 2 *Atk. R.* 439.

*E. Vanarsdale*, contra—made no objections on account of the interest not having been brought in question in an earlier stage of the cause, or on account of the principal sum of $2000 being paid; but insisted, that the widow was not entitled to interest on the legacy from the death of the husband, upon the ground of its being given as a provision for her support; the rule allowing interest for maintenance, extending only to the case of infant children: nor on account of its being a legacy out of lands; the distinction with respect to the fund out of which a legacy was payable, having been abolished. That she was not entitled to interest after the year, as payment of the legacy had been offered to her, and she had declined accepting it. That the doubts which existed as to the will, affected the legacy given to the church, but did not extend to her legacy. The only doubt that affected her interest, was, as to the lot of land devised to her. That, if she was embarrassed by it, the residuary legatees ought not to suffer. He cited, 12 *Ves. jr.* 461; 15 *Ves. jr.* 301; 2 *John. C. R.* 628; 1 *Swans. R.* 553; 7 *Ves. jr.* 96; *Fran. Max.* 105; *Marsh. Ken. R.* 161; 3 *Bin. R.* 295.

*Hornblower*, in reply. This is not the case of a *mere legacy*. It is a provision for the wife in lieu of an estate in land, of which the husband could not deprive her, by his will or otherwise; which would have produced a present profit. That the interest of the residuary legatees could not affect her rights.

THE CHANCELLOR. This case comes up on an application to the court for directions, as to the payment of interest on a legacy of $2000, given to the widow, by the will of Ackerman, the testator. On looking into the matter, I see nothing to take the case out of the common rule applicable to interest on legacies generally. The idea that this was intended as a maintenance to the widow, and that therefore interest should be allowed from the death of the testator, cannot be supported. The exception extends to infants only. 1 *Swans. R.* 553; 2 *John. C. R.* 628. The only dictum to be found in favor of extending the exception to the wife, is that of Lord Alvanley, in *Crocket* v. *Dolby*, 3 *Ves. jr.* 16; and this has been many times overruled: *Stent* v. *Robinson*, 12 *Ves. jr.* 461; *Lowndes* v. *Lowndes*, 15 *Ves. jr.* 301; *Raven* v. *Waite*, 1 *Swans.* 553; and the cases there cited. Nor is it material that the legacy in this case was payable out of the land. The question of interest is not regulated by the fund out of which the legacy is to be paid, whether it be productive or not: *Gibson* v. *Bott*, 7 *Ves. jr.* 89. On the other hand, the legatee is not to be deprived of her interest, because she declined receiving the legacy when payment was offered by the executors. A controversy was pending respecting the will of the testator, so far as it affected the real estate; with that controversy her rights under the will were in a degree connected; and I think she is excused, at least, if not justified, in declining to receive the legacy until the matter was settled. The executors have performed their duty fully; and the widow has done nothing, as I conceive, to forfeit her rights. My opinion is, that the widow be allowed interest on the legacy from the 28th day of January, 1829, being one year from the testator's death.

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## SMITH v. ALLEN ET AL.

A general demurrer admits the truth of all the material allegations of the complainant's bill that are well pleaded.

Where a sheriff, *colore officii*, takes a bond for the performance of matters not authorized by the statute, the bond is void.

But if there be a mere verbal difference or departure from the provision of the statute, which imposes no new duty on the obligor, or no duties diverse from

those required by the statute as justly and legally expounded, the bond will be good.

If, under the act of 1799, *Rev. L.* 426, which directs the courts of common pleas to mark and lay out the bounds and rules of the prisons in their several counties, and provides "that every prisoner in any civil action, giving bond to the sheriff with sufficient securities, *that he will keep within the said bounds*, shall have liberty to walk therein; and if he walk out of said bounds the bond shall be forfeited," the sheriff take a bond with condition "that the prisoner shall keep within the bounds of the prison limited and prescribed by the judges of the court of common pleas of the county of E—, *and not walk out or depart the same until he be discharged by due course of law*," it is within the rule, and a good bond.

Such a bond is not a bond of *indemnity*, strictly speaking. It does not lie in the mouth of the obligors to say the sheriff is not damnified. There is no necessity of showing an actual damnification. The bond is actually forfeited by the defendant going off the limits, and the cause of action is made out by proving the bond and the escape.

Equity will not interpose to effect the forfeiture of a privilege, the divesting of an estate, the taking away of a right by condition, subsequent or otherwise, or the discovery of some matter which may render an act done illegal and thereby subject the party to a penalty. But this rule does not apply to the case of reforming a mistake in a bond for the prison limits.

When the proof of a mistake in a bond is full and satisfactory, equity will relieve, even against securities; and that as well where the complainant seeks relief affirmatively, on the ground of the mistake, as where the defendant sets it up to rebut an equity: such a case is not within the statute of frauds.

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The bill states that the complainant was sheriff of Essex county. That about the 25th day of May, 1826, there was placed in his hands a writ of *capias ad satisfaciendum*, issued out of the inferior court of common pleas of said county, against D. K. Allen at the suit of the president, directors and company of the Paterson bank, for $979.57, besides interest; and that on the same day he arrested the defendant, by virtue of the said writ. That the said D. K. Allen, insisting on the benefit of the prison limits, and offering sufficient sureties, the complainant agreed to accept the same, and permit him to walk within the said limits. That the complainant prepared a bond, which was on the same day executed by the defendants in this case, Allen, Cobb, and Carrick; and thereupon he permitted the said defendant, Allen, to walk within the limits of the prison. That on the same day the said Allen did knowingly and intentionally walk out of the limits, and still remains out of the same, against the condition of the bond. That the complainant, in the hurry of business, and by mere accident

and mistake, in drawing the said bond, described the writ in the reciting part of the condition of the bond, as *an original execution*, and returnable the fourth Tuesday of *April;* whereas the said writ should have been described as a *ca. sa. post fi. fa.* and returnable the fourth Tuesday in *June.* That the writ was described as issuing for the sum of $979.57, *with interest from 20th September*, 1825; whereas on the face of the writ it purported to be for the sum of $979.57, *residue of damages and costs*, but was *endorsed* to have been issued for that sum with interest as aforesaid, which led to the error, if any it is, and that this was through mistake and inadvertence. That the plaintiff in the execution, threatened to proceed against the complainant as for an escape, and refused to accept an assignment of the bond, but agreed to bring a suit thereon in the name of the complainant. An action was accordingly commenced; and a declaration having been filed, the defendants have pleaded (*inter alia*) that the said bond was not given to the complainant under and by virtue of the arrest of the said D. K. Allen, upon the said writ of ca. sa. in the said declaration mentioned: under which plea it is supposed they intend to avail themselves of the said mistakes. That after this plea pleaded, the bank refused to proceed farther, but left the suit to be carried on by the complainant at his own expense, and have now prosecuted the complainant for an escape. The bill prays that the recital in the condition of the said bond may be reformed and corrected, and made according to the fact and truth of the case; and that the defendants may be restrained from setting up or insisting on, by way of defence, the aforesaid variance or discrepancy between the writ and the recitals in the condition of the bond; and that the defendants may be restrained from non-prossing the complainants for not replying to said plea until they shall have answered, &c.

To this the defendants have filed a general demurrer.

*E. Vanarsdale*, for the defendants. The demurrer ought to prevail, because the complainant has not made such a case as would enable him to support his action at law, if the mistake in the bond was rectified according to the prayer of the bill: 3 *Bro. C. C.* 155; *Beams. Pl. Eq.* 276. The condition of the bond taken by the sheriff is larger and more comprehensive than the statute requires or authorizes. The condition prescribed in the

act, *Rev. L.* 426, is, "that the defendant will keep within the bounds of the prison;" to which, in this bond is added, "and not walk out or depart the same until discharged by due course of law." This imposes a duty not authorized by the statute, which might operate oppressively. If the prisoner should compromise with the plaintiff, and walk off the limits, without obtaining a regular discharge from prison, the bond would be forfeited. The bond is therefore void: 1 *Pen. R.* 118; 2 *Pen. R.* 500; 19 *John. R.* 233. But if the bond was good, the complainant is not entitled to the relief prayed. This suit is to aid the action at law. In that action the sheriff must show that he is damnified by the prisoner having gone off the limits; which he could not do at the time the action was commenced by him. No action had then been commenced against him, and it might be that he would never be called on. Before he can maintain an action on the bond, he must have paid the money. 10 *John.* 584. The complainant seeks to have this bond rectified to enable him to enforce a penalty; but equity does not assist in the recovery of a forfeiture: 4 *John. C. R.* 431; 1 *Peters R.* 236; 19 *Ves. jr.* 225. But the main question is, can the complainant come into this court and falsify his bond to have it carried into effect. He alleges no fraud; the bond was drawn by himself. He sets forth no previous agreement that the defendant should give him a different bond; he has nothing by which to rectify the bond. Equity will interfere to prevent a party enforcing an agreement entered into by mistake, but not where he seeks to have an agreement corrected to enable him to enforce it: 3 *Bro. C. C.* 390, *in notes;* 1 *Ves. and Beam. R.* 396. This rule is founded on the general law of evidence, and on the statute of frauds: *Rev. L.* 152. This bond is within the 14th section, which relates to contracts to answer for the debt, default or miscarriage of another. Hence the mistake, if any exist, cannot be amended: 7 *Ves. jr.* 211; 14 *Ves.* 524; 15 *Ves.* 516; 2 *Mad. C.* 120; 1 *Scho. and Lef.* 22; 1 *Bro. C. C.* 92.

*J. C. Hornblower*, for the complainant. I admit the position that relief here would be unavailing, if after rectifying the bond we have no remedy at law. But the statute under which the bond was taken, *Rev. L.* 426, does not prescribe the form of the condition; it only gives the substance, and states what shall be a for-

feiture. The condition of the bond taken by the sheriff is not more comprehensive than that authorized by the act. It is substantially the same. Both branches of the condition mean the same thing: either would be sufficient, and in compliance with the act. The latter part is merely a repetition, in other words, of what is comprised in the former. It imposes no additional obligation, and may be regarded as surplusage. In the cases cited on the other side, the enlargement of the condition of the bonds beyond what the law authorized, was manifest. The additions were material. The difficulty suggested by the counsel cannot occur under a bond like the present. If the prisoner satisfy the execution on which he is confined, the law authorizes him to go off the limits, without an order of the court: this is a discharge in due course of law. A bond to keep within the prison bounds is not a *bond of indemnity*, in the legal acceptance of the term. The plea of *non-damnificatus* cannot be pleaded to an action brought upon such a bond. It is not necessary the sheriff should have paid the money, to enable him to maintain an action. The cause of action is made out by proving the bond, and the escape: 5 *John. R.* 42: 1 *Saund. R.* 171, *N.* 1; *Cro. El.* 914; 1 *Leon.* 71; 3 *Mod.* 252; *Carth.* 375; 5 *Mod.* 243; 1 *Bos. and P.* 638; *ib.* 40, *N. b.; Cowp.* 47; 2 *T. R.* 100; *ib.* 640; 7 *T. R.* 97; 14 *John.* 177; 1 *John. R.* 271. The case in 10 *John. R.* 584, is not applicable: the plea of non-damnificatus was not pleaded in that case, (*See* 9 *John. R.* 234.) Under our statute, *Rev. L.* 651: If the prisoner go beyond the limits, it is "an absolute forfeiture of the bond; and the sheriff, or plaintiff in case the bond has been assigned to him, may maintain an action on the bond, notwithstanding the prisoner may have returned within the prison limits before the commencement of the suit." And the plaintiff must have judgment for the penalty, and execution for the amount due: 15 *John. R.* 474. The objection that equity will not assist by reforming the bond, in order to enforce a penalty, applies to a class of cases very different from the present. We are seeking, by means of this bond, the recovery of a debt. It is not necessary for us to charge fraud: *mistake* is equally a ground for equitable relief: 1 *Ves. and Beam.* 165. As to a previous agreement by which to correct the bond, it is implied in the very nature of the transaction. It was to give such a bond as we desire this to be

made; such a bond as the law required upon the arrest of the defendant, by virtue of the writ on which he was taken and in custody. The writ we have set out in the bill. As to the statute of *frauds*, our case is not within it. We are seeking the liability of the man who owes the debt, and have the agreement in writing required by the statute. If there is any mistake in this, the court have power to correct it, even against sureties. No question can now be made as to the competency or sufficiency of the evidence to prove the mistake. We are here upon a state of facts set forth in the bill, and a demurrer, which admits the truth of every thing well pleaded. *Prec. in Ch.* 309; 2 *Atk.* 31; 3 *Ves. jr.* 580; 2 *Ch. Ca.* 225; 2 *Freem. R.* 16; 4 *T. R.* 213; 2 *John. Ca.* 42; *Finch.* 413; 9 *John. R.* 285; *Day's C. Er.* 139; 2 *Atk.* 203; 1 *Ves.* 317; 1 *John. C. R.* 274.

*Vanarsdale*, in reply. The New York case, 10 *John.* applies to the present. The only difference between the statutes of New-York and New-Jersey as to giving bond, is, that our last act prevents the party from pleading a voluntary return before suit brought. The true distinction as to enforcing forfeitures, is to be found in 1 *Ball & Bea.* 273. This is not a case in which the court will correct the bond: no agreement is set forth in the bill. The cases where mistakes have been corrected on joint and several bonds, are upon the principle that the parties were all originally liable: here there was no pre-existing liability to pay; it is the bond that creates the liability: 1 *Pet. N. J. R.* 14; 2 *Merriv.* 36. The statute of frauds will not permit an amendment in such a case. The sureties are within the statute, and may have the benefit of the demurrer, if the principal cannot, although the demurrer is joint: 8 *Ves. jr.* 403.

The Chancellor. It is contended, in the first place, that the complainant has not by his bill made such a case as will support his action at law, even if the mistakes in the bond are rectified. And it is very properly admitted, that if this be so the bill cannot be sustained, and the demurrer is well taken. The ground of objection is, that the condition of the bond which is sought to be reformed, is larger than the statute requires or authorizes, and therefore the bond itself is void. The condition of the bond is,

"that if the above named D. K. Allen, shall and do keep within the bounds of the prison, limited and prescribed by the judges of the inferior court of common pleas in and for the county of Essex, and not walk out or depart the same until he be discharged by due course of law, then this obligation to be void," &c. The only condition prescribed by the statute is, that the prisoner *shall keep within the bounds prescribed* by the court of common pleas, &c. The objection cannot prevail. It is true, that when a sheriff, *colore officii*, takes a bond for the performance of matters not authorized by statute, such bond is void. The power of the officer in that behalf is a strict power, and shall not be extended. But while this principle is fully recognized, care must be taken in its application, that the ends of justice be not defeated by technical or verbal criticism. In the case of *Sullivan* v. *Alexander*, 19 *John. R.* 234, cited by the defendants' counsel, the rule is laid down broadly, that when there is a substantial variance,—as if the sheriff adds to the condition, that he shall be kept without damage against the king and the plaintiffs,—that will make the whole condition void. But it is also added, that a mere verbal difference or departure from the provision of the statute, will not render the bond void.

If the condition of the bond imposes no new duties on the obligors, or no duties diverse from those required by the statute as justly and legally expounded, then it will be good. And I am clearly of opinion that this condition is within that rule. The condition in the statute is very brief. It is simply, *that the prisoner shall keep within the bounds of the prison.* The condition of the bond is, that he shall keep within the bounds of the prison limits, *and not walk out or depart the same.* This latter part imposes no new duty. It is simply a repetition of the former part, but clothed in a new dress. It is mere surplusage, and cannot vitiate. But the condition of the bond goes farther, and says, the prisoner shall not depart the limits *until he be discharged by due course of law.* And it was contended that this might operate hardly upon the prisoner: that if the debt was paid, and he departed the limits without some judicial order, the bond would be forfeited. If this were even true, would it not apply with equal force to a bond, the condition of which was simply, that the prisoner should keep within the limits? This, taken literally,

would mean, that not only the payment of the debt, but even the order of the court, would be insufficient to warrant the prisoner in walking off the limits; and that if he did so depart, the bond would be forfeited. It is absolute, and admits of no exception. But this is not the true construction. When the money is paid, the defendant can no longer be retained in custody; the object of the execution is satisfied. The command of the writ is, that the sheriff take the body of the defendant, and keep him, so that he satisfy the plaintiff the debt or damages, as the case may be. Upon the payment of the money he is to be discharged. He has a legal right to demand it; and if the sheriff discharges him he does it lawfully; or as the bond says, he is discharged by due course of law. I am satisfied that this bond is substantially correct. If not precisely according to the form of the statute, yet "it is to be known," as Lord Coke says, "that there are two manner of forms, *sc. forma verbalis* and *forma legalis;* forma verbalis stands upon the letters and syllables of the act: forma legalis is forma essentialis, and stands upon the substance of the thing to be done, and upon the sense of the statute: qua notitia ramorum hujus statuti non in sermonum foliis, sed in rationis radice, posita est." *Beaufage's case,* 10 *Co.* 100.

But it is alleged that if the bond is a good bond in these particulars, the complainant does not show such a case as entitles him to relief. He does not show that he is damnified. He has not paid the money, and the plaintiff in the execution may never call on him. That when the bill was filed, the suit for an escape was not instituted; and we must regard the rights of the parties as they were when the bill was filed.

It is expressly stated in the bill, that an action for the escape had been brought against the complainant, by the Paterson bank, and was then pending. This allegation must be taken as true, and is so considered by the court under the demurrer filed. It is not however, deemed important. This bond is not a bond of indemnity, strictly speaking. There is no necessity of showing an actual damnification. The bond is forfeited by the defendant's going off the prison limits. It is an escape, and the sheriff is liable. It does not lie in the mouth of the defendant to say, you are damnified; you have not yet been obliged to pay the money; and while you thus remain uninjured, you have no

rights against me. It is unjust that the sheriff should be exposed to an absolute liability, have the means in his own hands of protecting himself against it, and yet be unable to move, until the plaintiff in the execution shall first move against him. The cause of action is made out by proving the bond and the escape: *Kip* v. *Brigham*, 7 *John. R.* 271. And this is manifestly so under our statute. The sheriff is authorized to assign the bond. If there was no right of action in the sheriff, he could convey none to the plaintiff, and the assignment would be unavailing. As well, therefore, on the ground that this bond is not a bond of indemnity, as that the forfeiture under the statute is an absolute forfeiture, and that a right of action follows as a necessary consequence, this second objection is deemed insufficient.

The third objection raised to the complainant's bill, is, that it seeks to get the bond rectified in order to enforce a penalty; and it is said that equity does not assist in the recovery of a forfeiture. That is unquestionably the doctrine of this court. But the attempt to apply it to a case like the present, is not sustained even by the decisions adduced by the defendant's counsel. The case of *Livingston* v. *Tompkins*, 4 *John. C. R.* 415, was an injunction case; and the injunction was moved for on the ground, that the grant from the plaintiff to the defendant had ceased and become void, in consequence of the matters charged in the bill. In that case, Chancellor Kent referred to a distinct and well known class of cases, showing that a man is not bound to answer so as to subject himself, either directly or eventually, to a forfeiture or penalty: and that a court of equity will not aid in working a forfeiture, or divesting an estate. The cases of *Hosburg* v. *Baker*, 1 *Peters' U. S. R.* 232, and *Paxton* v. *Douglass*, 19 *Ves.* 224, also referred to, are of the same character. They have reference to the forfeiture of some privilege, the divesting of some estate, the taking away of some right by condition subsequent or otherwise; or to the discovery of some matter which may render an act done illegal, and thereby subject the party to a penalty. To effect these objects, equity will not interpose. But neither the rule nor the reason of the rule, has any application to this case.

The real question arises upon the fourth objection; which is, that although a court of equity will relieve, in cases of mistake, to *prevent a party from enforcing* an agreement entered into by

mistake; yet it will not *aid a party* who seeks to have an agreement corrected, for the purpose of enforcing it. And the reason assigned is, that it would be contrary to the provisions of the statute for the prevention of frauds and perjuries, and also contrary to the general law of evidence. This objection, if sound, is radical, and therefore requires a careful consideration. The question comes up on a general demurrer, which admits all the material allegations of the complainant's bill that are well pleaded.

The bill states, that Allen was duly arrested, by virtue of the writ, and was in custody: that he requested permission to walk within the prison limits; and, offering sufficient sureties, the complainant agreed to accept them, and thereupon prepared a bond, which was executed by the defendants: and that then the complainant permitted the said Allen to have the benefit of the prison limits. The bill further states, that the alleged variation between the bond and the writ was owing to the "hurry of business, and by mere accident and mistake." There is no explicit agreement set forth in the bill, as having been made between the complainant and all the defendants, or even between the complainant and Allen himself, in relation to the kind of bond that was to be given; and it was contended that the bill was defective in that particular. I think it is not. This is a case where the agreement, if entered into at all, must have been regulated by law. It admitted of neither extension nor abridgment. If, then, the defendant, Allen, on being arrested, requested to have the benefit of the limits, and offered sufficient sureties to enable him to procure it, and the sheriff agreed he should have it on giving bond with security, and the bond was accordingly prepared and given; it is manifest that the one party agreed to give, and the other to accept, such a bond as would enable the sheriff legally to release the defendant from arrest in that particular case, so far as to give him the benefit of the limits. The agreement and the mistake are sufficiently charged. How or by what proof they may be sustained, is not now to be considered.

The inquiry, then, presents itself, can such a mistake be permitted to be shown by the complainant, to correct the bond on which he seeks to recover: or can it only be shown by the defendant, when set up to rebut an equity? This is not alleged to be a case of fraud, but of mere mistake; and it

was forcibly argued, that even if cases of fraud might properly be considered as exceptions, and out of the statute, mistakes were to be placed altogether on a different footing. That a defendant may set up and avail himself of a plain mistake in a written agreement, and thereby relieve himself from the operation of the agreement, is a principle too well settled in courts of equity to be shaken at this day. It would be a waste of time to enumerate the authorities. That the plaintiff is entitled to the same assistance to enable him to recover, has not been uniformly admitted at Westminster Hall, but there is a train of cases in favor of the proposition, which certainly go very far towards settling it. In *Uridale* v. *Halfpenny*, 2 *P. Wms.* 151, (1723,) a bill was filed to rectify a mistake in a settlement, in placing the term after the limitation in tail to the sons, whereas the term should have been before such limitation. Sir Joseph Jekyll sustained the bill, and helped the mistake. This case was afterwards recognized and approved of by Ld. Hardwick, in *Heneage* v. *Hunloke*, 2 *Atk.* 456. In *Simpson* v. *Vaughan*, 2 *Atk.* 31, (1739,) Ld. Hardwick corrected a bond, which, *by mistake*, was made a joint bond instead of a joint and several bond: and this was done on the application of the complainant. The case of *Hinkle* v. *The Royal Exchange Assurance Company*, 1 *Ves. sen.* 317, was decided by the same chancellor in 1749, and is a leading case on the subject. The bill was filed to have a policy of insurance rectified. The warranty was from London, when it was insisted it should have been from *Ostend* only. Ld. Hardwick says, "no doubt but this court has jurisdiction to relieve, in respect of a plain mistake in contracts in writing, as well as against frauds in contracts, so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified." Evidence was admitted to show the mistake, but not being conclusive, the bill was dismissed, without costs. In *Baker* v. *Paine*, 1 *Ves. sen.* 456, (1750,) articles of agreement were allowed to be rectified on application of the complainant, by the minutes and calculations made at the time. Again, in *Burn* v. *Burn*, 3 *Ves jr.* 573, (1797,) a joint bond was held by Lord Rosslyn to be a several bond, even against creditors, and the mistake was shown on the part of the complainant. So also in the *South Sea Co.* v. *D'Oliffe*, cited 6 *Ves. jr.* 601, the party was

relieved against a mistake in a bond, given by way of security, six months having been inserted instead of two months. The same doctrine is maintained by Ld. Thurlow in *Taylor* v. *Radd*, cited in 3 *Bro. C. R.* 454, and by Ld. Eldon, in *Barstow* v. *Kilvington*, 5 *Ves. jr.* 593. In this last case a settlement was reformed in favor of the younger children, against the heir of the mother. The chancellor remarks, that the settlement was certainly such as never could have been the deliberate intention of the parties making it; and the evidence being full, the mistake was rectified. It would be needless to multiply authorities. They may be found collected in 2 *Bridgm. Index*, 320, tit. *Mistake; Sugden on Vendors*, 120; *Jeremy on Eq. Ju.* 432, 456, 489.

There are cases which seem to lead to a different conclusion: such as *Woolam* v. *Hearn*, 7 *Ves. jr.* 211; *Higginson* v. *Clowes*, 15 *Ves. jr.* 516; and *Clinan* v. *Cook*, 1 *Scho. & Lef.* 39. But these are all cases where bills were filed for a specific performance, and in which the complainant undertook to aver against his own instrument. They appear to be governed by a different rule, the correctness of which has been questioned by high authority. See 4 *John. C. R.* 148, *Kisselback* v. *Livingston*. But in relation to reforming deeds, bonds, mortgages, &c. the weight of authority is evidently in favor of the power of this court, whether sought on the part of the complainant or the defendant; and that, whether the matter to be corrected has originated in fraud or mistake. The statute of frauds does no more protect the defendant against mistake than the plaintiff: both stand on the same foot. In this country the principle has been recognized very distinctly by chancellor Kent, in *Wiser* v. *Blachly*, 1 *John. C. R.* 607, where a guardianship bond was corrected and enforced, even against sureties, and upon the broad principle, that where a mistake was manifest, the court, in the exercise of its ordinary jurisdiction, would correct it, and hold the party according to his original intention. So in *Gillespie* v. *Moore*, 2 *John. C. R.* 585, the court, after collecting and revising most of the cases on the subject, decided that equity would relieve against a mistake, and that as well when the complainant seeks relief affirmatively, on the ground of mistake, as where the defendant sets it up as a defence, or to rebut an equity. This case came under review in the court of errors, on the argument of the appeal of *Lyman* v.

*The Utica Insurance Co.;* and the broad principle was sustained by a large majority of the court. Chief Justice Spencer, in remarking on it, says, that "it will remain a land-mark for future decisions: the reasoning is strong, irresistible, and conclusive:" 17 *John. R.* 377. I am satisfied to adopt this as the correct principle. It is supported by the current of authorities and the reason of the thing. It should be carefully guarded, I admit. The evidence to support the mistake should be full and satisfactory; such as to leave no room for reasonable doubt, especially if denied by the defendant's answer. But when such evidence is adduced, and the use intended to be made of the mistake is unconscionable and oppressive, it would seem to be the privilege and the duty of this court to interfere, so as to prevent gross and flagrant injustice. Under this view of the case I shall order the demurrer to be overruled, with costs.

CITED *in Hendrickson* v. *Ivins, Sax.* 569; *Martin* v. *Righter,* 2 *Stockt.* 516; *Firmstone* v. *De Camp,* 2 *C. E. Gr.* 314.

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## EXECUTOR OF SIMMONS v. VANDEGRIFT ET AL.

After a judgment is satisfied, the sheriff has no authority to sell, and his deed can convey no interest to the purchaser.

The legal process of execution in the hands of the sheriff is not affected, or the title of a purchaser at the sheriff's sale impaired, by an attachment issued against the plaintiff in the execution, and levied on the money in the hands of the defendant, after the execution levied, and before the sale

Mere inadequacy of price, without fraud or collusion, is not sufficient to set aside a purchase at sheriff's sale.

A mortgage given for purchase money on a sale of land, by one defendant in execution to his co-defendant, is not, on the principle of *lien for purchase money,* entitled to priority over the antecedent judgment against both, nor can it affect the title of a purchaser under the judgment, although the property was levied on and sold *as the property of the mortgagor.*

Irregularity in the sheriff selling lands before goods, without a written request from the defendant, cannot affect the title of a purchaser at the sheriff's sale.

The bill charges, that in May, 1816, John Vandegrift mortgaged the premises in question, a lot of about six acres, to Richard Edsall, junior, for $1300. That this mortgage was given for the purchase money on a sale of the premises by Edsall to Vandegrift: and that Edsall, on the 4th of November, 1816, assigned the mortgage to Henry Simmons, of whose will the complainant

is executor. That in May, 1813, Robert Morris, as administrator of the Earl of Perth, obtained a judgment against Edsall, under which his property was sold, and purchased by Robert Boggs, who claims title to the premises in controversy. That in February, 1816, Smith and Loring obtained a judgment in the common pleas of Sussex, against the said Richard Edsall, junior, Richard Edsall, senior, and John Vandegrift. In November, 1816, Kinney and Fairchild obtained a judgment in the same court against —— Seward and John Vandegrift: and in August, 1817, Daniel Borden obtained a judgment in the same court against the same defendants. That by virtue of these last executions, Daniel Swayze, esq., sheriff of Sussex, levied on the mortgaged premises as the property of Vandegrift, and in January, 1819, sold the same to William Darrah for eighty-five dollars, and afterwards conveyed the property to the purchaser. The bill farther charges, that Darrah, the purchaser, knew of the mortgage outstanding: that the property was sold for a price grossly inadequate, being worth from twelve to fourteen hundred dollars: that the judgments were satisfied at the time of sale, and that fact known to the purchaser; and therefore, that the sale was fraudulent, and void. The prayer of the bill is, that the deed from Sheriff Swayze to Darrah may be declared void, on the ground that the sale was fraudulent, and under a satisfied judgment; and that the equity of redemption in the mortgaged premises may be foreclosed, and the premises sold to satisfy the complainant's mortgage. Vandegrift, the mortgagor and defendant in the executions, Robert Boggs and William Darrah, purchasers, Daniel Swayze, the sheriff, and Jacob Wilson, his under sheriff, are made defendants.

William Darrah, (the real defendant,) in his answer, admits the complainant's mortgage; that he purchased the property for eighty-five dollars, and received a deed; and that he had notice of the complainant's mortgage: but expressly denies all fraud, as well as all knowledge that the judgment of *Smith and Loring* v. *Vandegrift et al.* was satisfied. He also denies that the said judgment was satisfied at the time of the sale, and insists that by purchasing under that judgment, which was prior to the complainant's mortgage, he intended to acquire, and has acquired, a title paramount to the mortgage.

*Ph. Dickerson*, for the complainant, said there was no controversy as to the existence and fairness of the mortgage: the only question arose upon the title set up by the defendant, Darrah. And he insisted that the sale by the sheriff to Darrah, was fraudulent, because it was made for a sum grossly inadequate, and Darrah purchased knowing of the complainant's mortgage. That the sale was unauthorized, as the sheriff had levied on personal property sufficient to satisfy the execution, and there was no request by the defendants that the land should be first sold. That a sale of the lands before the goods, in such case, was fraudulent, as against third persons, whose interests were affected by it, and the conveyance ought to be set aside. That the mortgage was given for purchase money, on the sale of the premises, by Vandegrift to Edsall, and as such was a lien on the property, entitled to priority over an antecedent judgment, by the common law, of which our statute was declaratory. That the property was levied on and sold *as the property of Vandegrift;* and Darrah had only purchased Vandegrift's right, which was subject to the lien of the mortgage. That the sale by the sheriff was void as against the mortgagee, because the judgment of Smith and Loring, (the only one prior to the mortgage,) was satisfied before the sale: for proof of which, he referred to some parol evidence taken in the cause, and relied on the fact, that Dr. Fowler had taken out an attachment against Smith and Loring, the execution creditors, and attached the money in the hands of Vandegrift, the defendant, before the sale by the sheriff on the execution. This, he insisted, superseded the execution; and the money, if any due on it, ought to have been collected by the plaintiff in attachment. He cited the following authorities: 10 *John. R.* 457; 1 *John. C. R.* 402; 4 *John. C. R.* 118, 255; 15 *John. R.* 458; *Rev. L.* 356, 671, 749.

*Hornblower* and *Vanarsdale*, for the defendant, Darrah, said, as there was no decree prayed against Swayze and Wilson, the bill as against them must be dismissed. And they contended, that the legal title acquired by Darrah, could only be impeached by *fraud*. That all fraud was denied by the answer; and there was no evidence to sustain the charge. That Simmons took the mortgage with equitable notice of the judgment. That Darrah,

with full knowledge of the mortgage outstanding, might lawfully purchase, and acquire a paramount title under the prior judgment, without being subject to the imputation of fraud. That the doubt which appeared to have existed as to the title to the premises, was sufficient to account for the property having sold at so low a price; and if not, that mere inadequacy of price, without fraud, was not sufficient to avoid a sheriff's sale. That any irregularity, in not selling the goods before the land, was a question between the sheriff and defendant only; and could not affect the title of a bona fide purchaser of the lands at the sheriff's sale. That this matter was not charged in the bill; and there was some evidence, also, of a request to sell the land. That a mere levy on goods was no satisfaction of the execution, unless they were sufficient, and were actually taken from the defendant by the sheriff: without this the sheriff was accountable only for the nominal amount of his levy. That as to the mortgage being a lien for purchase money, the principle did not apply to this case, as the judgment and execution were against both mortgagor and mortgagee. That there was no evidence that the attachment at the suit of Fowler, was levied on the particular moneys due on this execution; and if it was, money in the custody of the law could not be attached. The attachment could not arrest the proceedings of the sheriff on the execution. That there was no evidence of the judgment having been satisfied before the sale; and if it had, Darrah had no notice of it. That he was a purchaser for a valuable consideration, and entitled to the protection of the court. They referred to, 11 *John. R.* 517, 555; 7 *Ves. jr.* 34; 16 *John. R.* 127; *Coxe N. J. R.* 39; 2 *Atk.* 275; 2 *Ves. jr.* 454.

*Dickerson* replied, that no person, even without notice, could acquire title under a sheriff's sale, made upon a satisfied judgment.

The Chancellor. The first question that presents itself, is, whether the judgment was satisfied: if it was, the sheriff had no authority to sell, and the deed could convey no interest to the purchaser. I have no difficulty in saying, that the testimony of the complainant has not satisfied me, that at the

time of the sale the judgment of Smith and Loring was paid. The alleged statements of Wilson, the deputy sheriff, to Joseph Edsall, are contradicted by Wilson himself. Wilson declares that he never said to Edsall that the judgment was arranged or paid off, and that the fact was not so, but that at the time of the sale there was a balance due on the execution. The statement of Vandegrift to the same witness, made after the sale of the property, that the execution was paid, if to be received as evidence at all, is not entitled to much weight. The testimony of Mr. Ryerson, the attorney on record, is greatly to be relied on. He states, that according to his calculation, there was a balance due on the 7th January, 1819, (the time of the sale,) of $71.50, over and above sheriff's execution fees. He states further, that he called on Wilson to collect and pay over the balance, before the sale. And Wilson refers to the same statement, as having been received and acted on by him.

Some reliance was placed by the defendant's counsel on the fact, that an attachment was taken out before the sale, by Samuel Fowler, against Smith and Loring, viz. in 1817; and that the sum of forty dollars was attached in the hands of John Vandegrift, and fifty-two dollars and fifty cents in the hands of Thos. C. Ryerson, Esq.: and it was argued, that if this balance was attached, the sheriff could not go on and sell under the execution. But is it certain that this money, thus attached in the hands of Vandegrift, was the money due on the execution? If it was, did the issuing of the attachment, and the subsequent levy, pay the judgment, so as to affect the title of an innocent purchaser? I think not. The legal process of execution, in the hands of the sheriff, could not be affected by the suing out of the subsequent attachment; much less could the title acquired under it be impaired.

But it is insisted on the part of the complainant, that the purchase was for a nominal consideration; and that the purchaser knew, at the time, of the outstanding incumbrance in favor of the complainant. The defendant, Darrah, admits in his answer, that he knew of the outstanding mortgage; and alleges, that he purchased with the express intention of acquiring a prior right. This he had a right to do; and without giving notice of such intention to the mortgage creditor. Such creditor might have purchased in

the judgment at any time; or, if that had been refused, he might, on payment of the money, have compelled an assignment of it for his own security, and thereby prevented the possibility of any danger arising from a sale under a judgment prior to his mortgage. It is quite probable, from the evidence, that the property was purchased by Darrah for less than its real value: but the sale was open, fair, and bona fide. There does not appear to have been any fraud or collusion between the purchaser and the sheriff, or any other person; and under such circumstances, a mere inadequacy of price, would not justify this court in setting aside the sale and subsequent conveyance.

The cases cited by complainant's counsel—1 *John. C. R.* 402, and 4 *John. C. R.* 118—are not applicable. The one was a case of gross fraud and imposition, and the court granted relief, even against a judgment. In the other the purchase was made for a consideration perfectly nominal, on a stormy day, and when no persons were present but the sheriff and the purchaser: yet even in that case the sale was not set aside on the ground of fraud, but the purchaser was decreed to hold the property in trust for the benefit of all parties interested in it.

But what is the fact in relation to the alleged inadequacy of price? One witness says the property was worth, at the time of sale, about eight hundred or nine hundred dollars. Mr. Ryerson considers the property worth at that time about eight hundred dollars, if an indisputable title could have been made. In relation to the title, he says, it was known that the property had recently been surveyed by Joseph Sharp as vacant land, and was then claimed by him or those holding under him. It was also publicly known that the homestead farm of Richard Edsall had formerly been sold at sheriff's sale, and purchased by Robert Boggs, and the lot in question was supposed to be included in that sale. The witness bid on the property once or twice himself: after he declined bidding any more, it was struck off to Darrah for a little over eighty dollars. When all these facts are considered, instead of being a proof of fraud, it ceases to be a matter of surprise that so small a sum was realized from the sale.

It was also urged by the complainant's counsel, that the sale was fraudulent as to the mortgage creditor, because the goods and chattels of the defendant in the execution were not first sold,

and applied to the payment of the execution. If the lands were sold before the goods, it was irregular, unless there was a written request to that effect given by the defendant; and of this the evidence is not satisfactory. But such irregularity cannot affect the sheriff's deed, unless the purchaser had notice of it; which in this case is neither alleged or proved. *Den* v. *Lacony*, *Coxe N. J. R.* 39; and in *Deforest* v. *Lute*, 16 *John. R.* 127; it was held by the court, that a bona fide purchaser of lands at sheriff's sale has no concern with the fact, that the sheriff has omitted his duty in not first selling the goods and chattels.

There is one more point that requires to be noticed. The complainant alleges that the mortgage given by Vandegrift to Edsall, and by Edsall assigned to Simmons, was given for a part of the purchase money of the property on which it was a lien; and therefore that it is to be preferred, and the sale is void as against that mortgage. This appears to me altogether distinct and aside from the equity set up in the complainant's bill. It is no where alleged in the bill that the mortgage was given for the purchase money: nor is it claimed, that by reason of that fact, the mortgage is entitled to priority. The complainant put himself before the court, upon the broad ground, that the judgments were paid and satisfied; that this was known to the purchaser and sheriff; and that they effected the sale fraudulently, to injure the complainant's title. He should not depart too far, from the case which the defendants were called on to answer. Still, as no objection has been interposed by the defendants' counsel, in the argument, I shall raise no difficulty to a full investigation of the whole matter, especially as this part of the case was very strongly pressed.

The judgment under which Darrah, the purchaser, claims, was obtained in the term of February, 1816, in the common pleas of Sussex, by Smith and Loring, against Richard Edsall, junior, Richard Edsall, and John Vandegrift. Execution issued, returnable to May term, 1816. In the same month of May, Vandegrift mortgaged to Edsall the property in dispute. It appears by the testimony of Joseph Edsall, that Richard Edsall conveyed the property to Vandegrift, and that the making of the deed from Edsall to Vandegrift, and of the mortgage from Vandegrift to Edsall, were simultaneous acts; and that the mortgage was to secure part of the purchase money. The property was levied on

as the property of Vandegrift; from which circumstance, it is reasonable to suppose, the levy was not made until after the sale and conveyance from Edsall to Vandegrift. Admitting it then to be true, in the fullest extent, as contended for, that according to the common law, independent of and prior to our statute on the subject, the purchase money was a lien on the property sold, to the exclusion of any incumbrances against the purchaser; how can the present case possibly be affected by it? Edsall the vendor was a co-defendant with Vandegrift the purchaser. The property was bound by the judgment, in the hands of Edsall, before the sale, as well as in the hands of Vandegrift after the sale. The sale did not affect the judgment lien. The mortgage could not impair the rights of third persons. If Edsall had not sold the property, he could not, by the confession of a judgment, the execution of a mortgage, or in any other way, have divested it of the judgment lien. Nor can it be affected by a sale. It would be strange indeed, if a debtor, by a simple conveyance of his real estate, and taking a mortgage for the consideration money, should be able to gain a priority over a prior bona fide judgment creditor, and utterly destroy his lien.

But it is said that the sheriff levied on it as the property of Vandegrift: that this must have been after the sale, and consequently, after the mortgage: that Darrah only purchased the right of Vandegrift, and that right was subject to the mortgage. This is certainly true; and it is equally true, that both were subject to the prior judgment. The argument is, that at the time of the judgment, Vandegrift was not seized of this property: he had no right in it: the right was in Edsall; and that the right which Vandegrift acquired, was a right subject to the mortgage for the purchase money: that this right was all the sheriff could sell under his levy, and all that Darrah could purchase. The argument is plausible, but the conclusion is unsound and full of injustice. If the lot had been levied on before the sale from Edsall to Vandegrift, and as the property of Edsall, and been sold by the sheriff afterwards, as Edsall's property, there could have been no room for doubt. This might have been done: and even after the conveyance of the property from Edsall to Vandegrift, the sheriff might have levied on it as Edsall's property, and probably in strictness ought to have done so. But this was not done. Can

Edsall, or those claiming under him, now come into this court, and upon the common law doctrine of lien, actually supersede the incumbrance that was on the property before the supposed lien could have existed? Would it be equitable? Would it be just? If Edsall had not been a co-defendant in the original judgment, a different case would have been presented; and the question might then have been raised, how far the mortgage, being for the purchase money, was to be protected against an anterior judgment outstanding against the purchaser. But that question cannot arise here.

Upon the whole matter, I am of opinion that the complainant has no claim against the defendants. Let the bill be dismissed.

CITED *in Mercereau* v. *Prest*, 2 *Gr. Ch.* 463; *Wintermute's Ex.* v. *Snyder's Ex.*, *Id.* 496; *Marlatt* v. *Warwick & Smith*, 3 *C. E. Gr.* 111; *Nichols* v. *Disner*, 5 *Dutch.* 295; *Nichols* v. *Dissler*, 2 *Vr.* 465.

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## WILSON v. HILLYER AND DUNN.

A witness, who may be responsible as an endorser on one or more of several notes, is a competent witness between two other endorsers of the same notes, against whom judgments had been obtained, and their respective properties sold, subject to redemption: as to the terms of a subsequent agreement between them, concerning the re-sale of the property: his responsibility as an endorser does not create an interest in the event of that suit.

When there is nothing in the suit to change the liability of the witness; or when the change, if any, is only in the person to whom the witness is answerable, and his responsibility, in all events of the cause, is equal; the witness is not disqualified.

The declaration of one party, in the absence of the other, after an agreement made, touching the terms of that agreement, is not competent evidence for the party making the declaration.

It is not sufficient for a defendant, claiming to be a bona fide purchaser for valuable consideration without notice, to deny personal knowledge of the matters charged, without denying notice, before his contract. He must deny notice, even though it be not charged; and he must deny it positively, and not evasively; he must even deny fully, and in the most precise terms, every circumstance from which notice could be inferred.

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James Wilson, the complainant, in his bill, states, that he became indebted to the State Bank at New-Brunswick, and other banks, to a large amount, as endorser for one Joseph Demund. That Demund having failed to pay the notes, judgment was ob-

tained against the complainant by the bank; and execution being issued, his property, including a farm in the county of Warren, was sold, The bank became the purchaser, and received a deed from the sheriff. That the president of the bank, who attended the sale and bid off the farm, told the complainant he might remain in possession, and if he could find a purchaser for a larger sum than was due to the bank, he should have the excess, or might redeem by paying to the bank their amount. That the complainant remained in possession about two years, when William Hillyer, one of the defendants, proposed to purchase the farm, "and agreed and promised the complainant, and the said president and directors, that upon a deed being given to him for the property, he would pay and satisfy the amount of the judgment against the complainant, and he would pay the complainant, in addition thereto, the sum of one thousand dollars: upon which terms the complainant agreed the farm might be conveyed to him." That Hillyer has not paid, and now refuses to pay, the thousand dollars, which was to have been paid at the delivery of the possession of the premises to him. That Hillyer has since conveyed the farm to Jacob Dunn, the other defendant; who is seeking, by action of ejectment, to recover it from the complainant. And that Dunn, before his purchase, knew of the aforesaid agreement to pay the said sum of money to the complainant. The bill seeks to recover the thousand dollars, and prays for an injunction, &c.

The defendants filed separate answers. Hillyer, in his answer, admits the endorsements of the complainant, and the judgment, and execution, and sale of the complainant's property; and states that he was also an endorser for Demund, and his farm was sold under like circumstances, and at the same time, and also purchased by and conveyed to the bank. He states, he believes it to be true that they (the bank) permitted the said complainant to remain in possession of the said property that he formerly owned, and authorized him to contract to sell the same, and agreed to give him the surplus after satisfying their demand; and that the said bank made the same terms with him (Hillyer.) That after some time, and after the complainant had refused to make exertion to raise money to pay his proportion of the debt to the

bank, he disposed of his farm for four thousand dollars, and articled with the bank for the complainant's farm, in consideration of paying to them the balance that would be due to them after the said four thousand dollars. That after he returned from New-Brunswick, he informed the complainant what he had done; and it was agreed that the complainant should occupy the premises one year, paying rent, and at the end of the year give to the defendant peaceable possession, and a quit claim, executed by himself and wife, so as to bar her dower; and the defendant to pay the complainant four hundred dollars. That at the end of the year he went to the complainant's house, in order to pay him according to the contract, and to receive from him the conveyance; when the complainant refused unless the defendant would pay him one thousand dollars, which he refused. And the defendant denies "that there was any agreement between him and the complainant, for the payment of the sum of one thousand dollars to him, the said Wilson, or that there was any such agreement made by this defendant with the officers of the bank, for the benefit of the complainant."

The answer of the other defendant, Dunn, will be particularly adverted to hereafter.

Upon the filing of these answers, the injunction which had issued on the filing of the bill was dissolved, because the whole equity of the bill was denied.

Depositions were taken, and the cause set down for hearing. The Chancellor having been of counsel with one of the parties, Charles Ewing, Esquire, Chief Justice, was called on to hear the case, and advise the Chancellor. The cause was submitted on written arguments.

*Chetwood*, solicitor of complainant: *Southard*, of counsel.

————, counsel for the defendants.

The Chief Justice reported his opinion, which at this term was delivered by

THE CHANCELLOR. The first subject of enquiry from the evidence, is, upon what terms Hillyer purchased of the bank the

farm which had formerly belonged to Wilson: or, in other words, whether Hillyer did undertake to pay the sum of one thousand dollars to Wilson, as part of the consideration of the conveyance of the farm to him by the bank, and of the surrender to him of the possession by Wilson.

The farms of both Hillyer and Wilson were purchased by the bank for prices far less than their real value. The bank very honorably assured them, that whenever the farms could be again sold, they should reap the benefit of whatever might be obtained beyond the amount due to the bank. Hillyer contracted with Egbert for the sale of his farm for four thousand dollars; which, from all that appears or is said, I presume we may take to have been at that time its fair price. Hillyer contracted for the purchase, also, of the other farm. Thus far there is no dispute. But the terms of this contract are represented in a widely different manner by the parties, in their bill and answer. Hillyer, while he peremptorily denies that there was any agreement between him and Wilson for the payment to the latter of the sum of one thousand dollars, or that there was any such agreement made by him with the officers of the bank for the benefit of Wilson, after stating, that upon the sale, the bank permitted Wilson to remain in possession, and authorized him to contract to sell the farm, and agreed to give him the surplus after satisfying their demand, admits that before the conveyance by the bank to him, there was an agreement made between him and Wilson, whereby Wilson was to occupy the premises for one year, paying rent, and then to give Hillyer peaceable possession, and a quit claim executed by himself and wife so as to bar her dower; and Hillyer was to pay Wilson thereupon the sum of *four hundred dollars*. The denial of the answer of Hillyer, is therefore to be taken to extend rather to the terms of the agreement, or the amount to be paid as alleged in the bill, than to the fact of the making of an agreement, or an engagement to make a payment to Wilson on account of the farm; for the latter he expressly avows.

Independent however of any aid from the answer, and in opposition to all the weight to which, on the doctrine of the court of chancery, it would be entitled, if it contained a full and unequivocal denial, the evidence of the complainant satisfactorily shows an engagement on the part of Hillyer to pay Wilson the sum of

one thousand dollars; that this payment was part of the price or purchase money of the farm; and that the promise of Hillyer to make the payment was founded upon a sufficient and legal consideration. The testimony of the president and cashier of the bank, and of two other witnesses, is express to this point. Daniel W. Disborough, the cashier, says, "The bank afterwards sold the farm of Wilson to Hillyer. The terms of sale were, that Hillyer was to pay Wilson one thousand dollars, upon Wilson's wife relinquishing her right of dower, over and above the lien of the bank. Egbert was to pay four thousand dollars to the bank for Hillyer's farm, and Hillyer was to pay the bank their balance, supposed to be fifteen or sixteen hundred dollars, and to pay Wilson the sum of one thousand dollars. The contract was entered into in the presence of the deponent. The sum of one thousand dollars was to be paid when Mrs. Wilson released her right of dower, and Mr. Wilson his possession." Charles Smith, the president of the bank, testified, "that upon a meeting of the parties at the bank, (in the spring of 1822,) he mentioned particularly in the presence of all the gentlemen there, Hillyer among them, that Hillyer was to pay Wilson one thousand dollars over and above all his covenants and engagements to the bank; to which Hillyer assented; and it was the express understanding of the parties at the time; and in consequence of these express declarations, Wilson consented that the deed should be made out, and it was made accordingly to Egbert and Hillyer; to Egbert a deed for one farm, and to Hillyer for Wilson's. The thousand dollars was to be paid the next spring, at the usual time of leasing farms, and upon that sum being paid, Wilson was to give it up." Robert Thompson was also examined as a witness. To his testimony an exception was made at the examination, on the part of the defendant. It has not been insisted upon in the brief of his counsel, nor do I see any support for it. Responsibility as an endorser, if it exists, will not create an interest in the event of this cause; and although the facts respecting it are so darkly exhibited as to render reasoning on the subject difficult, it seems probable there is nothing to change his liability, or that any change which may occur, or has occurred, is only in the person to whom he may be answerable. If his responsibility in all events of the cause is equal, he has no disqualifying interest.

Thompson testifies, in the first place, of an interview prior to the negotiation with the bank for the purchase of the farm. He says, "Hillyer and Wilson called to see him. Hillyer informed him he had spoken to Wilson upon the subject, and that he had agreed with Wilson to pay him one thousand dollars." Thompson enquired of Wilson if that was so, and he said it was. "Hillyer informed him he had agreed upon the sale of his farm to Egbert for four thousand dollars, and mentioned the day on which they were to meet in New-Brunswick to make the proposition to the bank." Thompson went to New-Brunswick at the request of Hillyer. A meeting of the directors of the bank was called. At the request of Hillyer, and in his presence, Thompson made to them this proposition:—"He wished them to make a deed of Hillyer's farm to Egbert, and Egbert would pay or secure to them four thousand dollars; to make a deed of Wilson's farm to Hillyer, and Hillyer would pay them five hundred dollars, and secure the remainder by mortgage." The president then asked what Wilson would say to that. Thompson informed them that Hillyer had agreed to give to Wilson one thousand dollars, which Wilson had agreed to take, and in that case Wilson was willing that the bank should make to Hillyer a deed for his farm. The president said the proposal was a reasonable one, and the bank would agree to it. James Egbert, the person who purchased Hillyer's farm, called as a witness by the complainant, testified, that "he was present in March, 1822, when the agreement was made with the bank. Hillyer then stated he was willing to pay the thousand dollars to Wilson, provided they would convey the farm to him. About the middle of April, the witness and Hillyer came to New-Brunswick to fulfil the contract, and there they met with Wilson. Before the deed was given, the witness stated to Wilson that Hillyer had agreed to give him one thousand dollars and clear him of the bank. The president of the bank distinctly stated, in the presence of both Hillyer and Wilson, that Hillyer was to pay the thousand dollars to Wilson, and Hillyer assented to it. The deeds were then made out and executed."

Let us look farther into the case, to ascertain if there be any thing to overcome, or to render doubtful, the united and consistent testimony of four respectable witnesses. If there be, it

arises, 1st, from the article of agreement; or, 2d, from the testimony of James Vansyckel, a witness examined by the defendants; or, 3d, because Thompson was to pay part of the thousand dollars.

1. The article of agreement is between the bank and Egbert and Hillyer, for the sale and purchase of the two farms, and sets forth the terms, so far as the bank was concerned, but is totally silent as to any payment to be made by Hillyer to Wilson. The scrivener by whom it was drawn, may have supposed, as it was between the bank on the one part, and Hillyer and Egbert on the other, it was enough to state the payments to be made to the bank; and that as Wilson was not a party, mention of the payment to be made to him was unimportant; or some other reason may have existed; about all which it is useless to indulge in conjecture, since the fact is certain, and must therefore be followed by its legitimate consequences, that there is nothing said in it of any payment to be made to Wilson. Some of its contents may be, perhaps, as difficult to explain as its omissions; such as the introduction into the instrument of Thompson as a party, which, according to one of the witnesses, the scrivener who drew it could not afterwards account for, or why, having been introduced, he was not called on to execute it. There is, however, nothing in the article inconsistent with the alleged engagement of Hillyer to Wilson; and the mere silence of the article cannot serve to disprove a fact to which four witnesses have unitedly testified. Wilson, who was not only not a party to the article, but not even present at its execution, cannot be prejudiced by the omission. And if the omission cannot prevail to disprove the existence of such a promise on the part of Hillyer, it cannot otherwise avail, since the promise was binding, especially as the conveyance of the farm was completed and delivered to him.

2. The testimony of Vansyckel shows a negotiation between Hillyer and Wilson, but no actual agreement. Terms were in some degree discussed. It seems to have been the inception of the negotiation; was merely a proposition on the part of Hillyer, no determination being made by Wilson; which, on the contrary, was expressly postponed in order that Wilson—who said it was new to him, he had not thought of it, and did not know what

to say—might reflect upon it and consult his friends. This testimony may serve to render it probable that an agreement was made, and that Hillyer did engage to pay money to Wilson on account of the purchase of the farm; but standing alone it certainly would not prove that any agreement was actually made, nor ought it to have any weight to show the terms of the agreement, in opposition to witnesses who testify that they had the agreement and its terms from the mouths of the parties.

3. I find nothing in the evidence to show, that by the agreement of the parties, six hundred dollars of the one thousand dollars was to have been paid by Thompson to Wilson. Hillyer makes no such allegation in his answer. No one of the four witnesses mention any such agreement, but on the contrary all explicitly state that the whole was to have been paid by Hillyer. The president, on cross-examination, to this point said, that "he knew of no understanding that Mr. Thompson was to pay any part of the money." Thompson says, that "when he spoke of any sum that he considered himself bound to pay to Wilson, he had no reference to the one thousand dollars which Hillyer was to pay to Wilson, nor had he any intention that it should have any thing to do with it." The cross-examination of James Egbert, if competent—which I am inclined to deny, because he relates a declaration of Hillyer, in the absence of Wilson, and after the agreement was made, if ever made—by no means serves to show that the original agreement was different from what is represented by Egbert himself and the other witnesses; nor that Thompson, by the original agreement, was responsible for any part of the thousand dollars; nor that Hillyer was responsible for any less than that sum. It serves to show, from Hillyer's own words, that there was an agreement for one thousand dollars. It shows something more; for it is scarcely credible that Hillyer could have used the language imputed to him, if by the terms of the original agreement he was, as he alleges in his answer, to pay but four hundred dollars. If his agreement extended to that sum only, how could he say "he would have but four hundred dollars of the thousand dollars to pay, for that," or in other words, because, "six hundred dollars was to be paid by Thompson." Whether that sum was to have been paid by Thompson, or any body, or

nobody, could have had no effect on his engagement, if it was for four hundred dollars only. The deposition of James Vansyckel shows no undertaking on the part of Thompson to pay any part of the thousand dollars; nor does it show any agreement between Hillyer and Wilson, that Wilson should trust to Thompson for any part of the consideration money of the purchase which Hillyer proposed to make.

From this view of the subject, I deem it unnecessary to inquire into the responsibility of Thompson as endorser; and so deficient is the testimony in respect to the facts on which his liability, if any, depends, that it is most advisable to enter into no speculations on the subject.

Against William Hillyer, then, the evidence in the cause appears to me fully to establish the right of the complainant to relief.

If the engagement of Hillyer to pay the sum of one thousand dollars, as a part of the consideration money of the premises, is proved, it can be of little avail to enquire whether his bargain is a hard one or otherwise, since no fraud or imposition on him is alleged, and he must therefore fulfil his contract, and equity cannot relieve him against it or permit him to abandon it even if onerous. The result to which we are brought by the evidence as to the agreement, might indeed be more satisfactory, if upon an enquiry we should find that Hillyer has no reason to complain of his bargain. But the light from the evidence upon this matter is too glimmering and feeble to enable us even to grope our way. We have some proof, indeed, of the amount due from both to the bank; but I find it impracticable to ascertain the amount of their respective responsibilities. Both, there is reason to believe, were not endorsers on all the notes; and whether they were on any, or on which, joint endorsers, so as to be as between themselves equally liable; or separate endorsers, so as to be answerable in the order of endorsement; neither the allegations nor proofs do satisfactorily show. In the brief of the counsel of the defendants, it is said, that "in truth and equity the amount due from Wilson was one thousand dollars more than the amount due from Hillyer." It may be so, but I cannot find in the proof, support for the position. The counsel relies on what is said in Hillyer's

answer, to show that Wilson was the first endorser on one of the notes; but this allegation of the answer is not followed up by any proof; and if it be true that Hillyer was not, as Wilson was, an endorser on another note of one thousand dollars; yet of how many of the notes Hillyer may have been the first endorser, we have no proof. If they stood equally indebted to the bank, and "the interest which Wilson had in the farm that Hillyer bought of the bank, was worth as much as the farm that Egbert bought," as testified by Thompson, say four thousand dollars; then Hillyer, having satisfied to the bank, say five thousand seven hundred and seventy-five dollars, and having the Wilson farm, say four thousand dollars, would in fact have advanced but one thousand seven hundred and seventy-five dollars, and Wilson four thousand dollars; so that one thousand dollars paid by Hillyer to Wilson would not render their losses equal. It would, however, be of little profit to spend further time on this topic, as we are able to find support for conjecture only; and as a mere conjecture I would hazard the question, whether, if the bank recover any thing in the suit said to have been brought against Thompson, they will not hold it for the benefit of Hillyer, in case he should have discharged all the responsibilities of himself and Wilson to the bank?

Our next inquiry respects the case of Jacob Dunn. He is a purchaser of the farm from William Hillyer. He is charged in the bill with knowledge, before his purchase, of the agreement alleged by the complainant. In his answer he says, "he believes it to be true that William Hillyer afterwards purchased the said property of the said State Bank at New Brunswick; but this defendant has no knowledge of any contract on the part of the said William Hillyer with the said James Wilson, to pay him the sum of one thousand dollars, over and above the amount paid to the bank, nor of any such agreement being made with the bank for the benefit of the said James Wilson." The answer is not full and explicit, nor directly responsive to the charge. He evidently refers to, and intends to deny, personal knowledge of the contract or agreement. He does not deny notice of it before his purchase; and his allegation may be satisfied and be true even with notice, if he had no such personal knowledge. The

rule in equity is thus laid down by Chancellor Kent:—"If a purchaser wishes to rest his claim on the fact of being an innocent bona fide purchaser, he must deny notice, even though it be not charged, and he must deny it positively and not evasively; he must even deny fully, and in the most precise terms, every circumstance from which notice could be inferred:" *Denning* v. *Smith*, 3 *John. Ch. Rep.* 345. Moreover, at the time of the purchase by Dunn, Hillyer, from whom he bought, was not only out of possession, but Wilson was claiming adversely, and an ejectment had been previously instituted.

There is enough, then, in my opinion, in the case, to bring Dunn also, as well as Hillyer, within the relief to which Wilson is entitled.

What, in the next place, is the extent of that relief? It will appear from a succinct view of the rights of the respective parties

1. The complainant is entitled to the sum of one thousand dollars.

2. This sum of one thousand dollars should have been paid on the 2d day of April, 1823. Doctor Smith, the president of the bank, says, the one thousand dollars was "to be paid the next spring at the usual time of leasing farms." Hillyer, in his answer, says, "Wilson continued to occupy the premises for one year, according to the agreement, and at the expiration of the year, to wit, on the 2d day of April, 1823, he went to the house of Wilson for the purpose of paying him."

3. The possession of the farm should have been at the same time delivered by Wilson to Hillyer.

4. The defendants are entitled to a release from Hillyer and wife, of her right of dower in the farm. Daniel W. Disborough testifies that one of the terms of the agreement was a relinquishment of the right of dower of the wife of Wilson. The other witnesses do not, it is true, mention this matter; but they do not deny it, nor do they say anything inconsistent with it: I deem it, therefore, sufficiently proved by the direct and uncontradicted testimony of one respectable witness. This point is also in some measure strengthened by the fact, that, according to the article of agreement, the wife of Hillyer, as well as himself, was to execute a release to Egbert.

5. Inasmuch as acts should have been done in April, 1823, by both parties to the agreement, which yet remain undone; and as Wilson has since been in the receipt of the rents, issues, and profits, the amount of which, though not accurately ascertained by the testimony, is fully shown to exceed the annual interest on the sum of one thousand dollars, an account should, in my opinion, be taken of the amount due to Wilson; charging on the one hand, the one thousand dollars with interest from the 2d day of April, 1823, and allowing on the other hand, the just annual value of the farm, from the same time.

I do therefore, respectfully recommend to his excellency the Chancellor, that a decree be made to carry into effect these principles, with a reference to a master to take and report the account above mentioned, and that the question of costs be reserved until the final decree. CHARLES EWING.

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## SMITH ET AL. v. WOOD, ON BILL;—AND, WOOD v. SMITH, ON CROSS-BILL.

The party making payment has the right of directing its application to the discharge of any particular demand he may think fit, provided he does it at or before the time of making the payment; but if the payment is made generally, without any such direction, then the person receiving may apply the payment to any demand in his hands against the person by whom, or on whose account, the payment is made.

Smith and Wright, while partners in trade, purchased a part of the Millville furnace property, of Souders, and gave him their bonds and mortgage on the premises, for the purchase money. They sold and conveyed their respective moieties of the property to Jones, who gave his bond and mortgage to Smith for the purchase money due to him, and also a mortgage to indemnify him against the outstanding bonds to Souders. Jones afterwards conveyed the whole property to Quinby, who re-conveyed it to Wood, subject to these liens. Wood demised the property to Wright, who in the lease was bound to pay the balance of rents, after certain deductions, to Smith, "on account of his claims against D. C. Wood and the Millville furnace property, or such part as might then be due." Within the year, Smith, in lieu of the balance of rents, agreed to accept Wright's notes for specific sums, payable at six and seven months; which were given, and paid, without any further direction from Wood. The stipulation in the lease, from which Wright derived

his authority to pay Smith, was an appropriation by Wood of the payment subsequently made, and Smith was bound to credit it accordingly.

Before the receipt of the money from Wright, Smith had paid a sum of money to Souders, in part discharge of a judgment obtained against Wood and himself, on one of the outstanding bonds given for purchase money, and secured by the mortgage which was a lien on part of the property then in the hands of Wood. On making this payment, Smith had a perfect claim against the property for his indemnity; he had a right to pay this claim out of the first moneys received of Wright, and such application of the money was in strict conformity with the agreement and appropriation of Wood.

Whether land purchased by partners in trade, as between themselves, or between them and their creditors, is to be considered as real or personal estate? *Query.*—But where, as in this case, no claims of creditors interfered, and the partners themselves had not considered the property as partnership property, but treated it as real estate, and separately sold and conveyed their respective moieties, at different times, and for different prices, it must be considered as real estate; and the balance due on the bond of the partners to Souders, for the purchase money, not as a partnership debt, to be settled in the partnership accounts; but as a claim against the property, and the payment of that claim comes within the above appropriation.

There being in this case no claims of Smith, *against Wood and the property*, strictly speaking, i. e. which both were liable to pay, to the extent of the appropriation; it not appearing that Wood was personally liable to pay the *Jones* bonds and mortgage, although he bought the property subject to the lien; the stipulation in the lease, must, under the circumstances of the case, be understood to mean—the claims of Smith against the property in the hands of Wood, which he, as owner of the equity of redemption, was, in a certain sense, liable to see paid as part of the consideration of his purchase;—therefore a note, given by Wood to Smith and Jones, which grew out of the partnership transactions of Smith and Wood, but was not a lien upon the furnace property, was not within the appropriation of rent made in the lease, and Smith had no right to apply any part of the money received of Wright to the discharge of that demand.

By the stipulation in the lease, Wright was to pay the balance of rents, as they were received. Smith, in lieu of the rents, agreed to take the notes of Wright. They must be regarded as assumptions, to pay specific portions of the rent at specified times; and the whole amount of the notes must be applied, as payments, at the times they became due; and not the present value (after deducting discount) credited at the time the notes were given.

When there is a general payment made by A., by a draft in favor of B., without any specific appropriation by A.—and B. gives a receipt for the draft—"when paid, to be applied, first, to pay interest, and next, so much principal on Jones' bonds and mortgage on the Millville property"—this is an express appropriation of the funds, by which all parties are bound. It cannot afterwards be altered, but by mutual consent; and then, not to affect the rights of third persons.

A draft, payable out of a particular fund, at an indefinite period of time, and on a contingency, is not a bill of exchange, subject to the rules governing

commercial paper; and a general acceptance does not alter, but follows the nature of the draft. On receiving such a draft, and giving a receipt for it, promising "to credit it when paid," the receiver cannot be obliged to credit it until paid, or held accountable for not using due diligence to collect it: the original debt remains until the money is paid.*

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In July, 1827, Edward Smith, Hugh F. Hollingshead, and William Platt, exhibited their bill in this court against David C. Wood, and others, to foreclose the equity of redemption in certain mortgaged premises in the county of Cumberland. The bill states, that in the year 1816, Smith and Wood were seized in fee simple, as tenants in common, of a certain furnace, mills, lands, and other premises, in the said county, and that David C. Wood having bargained with one Joseph Jones to sell him his equal moiety of the property, he, Jones, with the knowledge and at the request of Wood, applied to the complainant, Smith, to purchase his moiety;—to which the complainant agreed, on condition that the purchase money should be secured by a mortgage on the whole property prior to any other incumbrance. In pursuance of this agreement, D. C. Wood, on the 25th March, 1816, conveyed to Jones his half part of said premises—and the complainant also conveyed to him his moiety—whereby the said Jones became the owner in fee of the whole, subject to an older mortgage to Keyser and Gorgas. On the same day, Jones and wife executed to Smith a mortgage on the said property, to secure the payment of four several bonds duly executed by him to the said Smith—one for the payment of six thousand two hundred and ninety-six dollars and ten cents, in one year from date, with lawful interest; and the remaining three, each for the payment of ten thousand two hundred and ninety-six dollars and ten cents, one payable in 1818, one in 1819, and the other in 1820; that after the execution and registry of this mortgage, viz: on the 27th March, 1816, Jones and wife conveyed the said premises to one Josiah B. Quinby, and on the 2d April, 1816, Quinby re-conveyed the same to Wood, subject to the complainant's mortgage, and that Wood agreed to pay off said mortgage.

On the 5th July, 1823, Smith assigned Hollingshead and Platt the mortgage, and the three last mentioned bonds, with the interest

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* On this point, see the decision of the Court of Appeals, *postea*.

due thereon from the 8th of February then last past;—the balance of interest up to that time, with the bond for six thousand two hundred and ninety-six dollars and ten cents, still remaining due, and to be paid to the complainant, Smith. Although sundry payments had been made, yet there remained due to Hollingshead and Platt, on the 8th February, 1827, the sum of seventeen thousand five hundred and fifty-three dollars and forty-two cents, besides certain notes given by Wood towards payment, amounting to five thousand five hundred and fifty-three dollars and fifty-six cents, but which are still unpaid; and there also remained due at the same period to Smith, on his bond, six thousand one hundred and sixty dollars and eighty cents. The bill further states, that a part of this property was originally purchased by Smith and Wood, of Keyser and Gorgas, who took a mortgage for part of the purchase money, which was a lien on that part of the property at the time of the purchase by Wood, and formed a part of the consideration; that Wood accordingly paid off said incumbrance with the exception of two thousand dollars, being the principal of two bonds for one thousand dollars each, one payable 1st October, 1819, the other 1st October, 1820; that on the 9th June, 1827, Keyser and Gorgas assigned to the complainant, Smith, the said mortgage and bonds, which bonds are still due. The bill prays a foreclosure and sale of the premises to satisfy the amount due to the different complainants.

David C. Wood, in his answer, states, that he and Smith were formerly in partnership as merchants, in Philadelphia, under the firm of Smith and Wood; that commerce being embarrassed, they agreed to turn their attention to the manufacture of iron, and for that purpose purchased the mortgaged premises described in the bill. He admits the sales as set out in the bill, and the giving of the mortgage to the complainant, Smith; but denies that he entered "into any absolute engagement personally to pay said Smith what was due on it." He admits the assignment of the bonds to Hollingshead and Platt, and alleges that he has made to them sundry payments, which ought to be credited on the bonds, and that he has fully paid and satisfied the mortgage of Keyser and Gorgas. He states further, that the notes, drafts, payments and advances drawn and made by him and his agents to the complainants, or their or-

der, and upon their account, and towards the payment of the said mortgage given by the said Jones to the said Smith, and which ought, in justice and good conscience to be allowed him, will, upon a just and fair account, in his opinion fully discharge said mortgage, and tenders himself ready to pay what may be due on an account taken, and hopes that if he has overpaid, the amount so overpaid may be refunded.

A replication having been put in, a decree pro confesso was taken against the defendants, who had not answered, and it was referred to one of the masters of the court, to take an account of what was due and payable for principal and interest on the mortgage and bonds given by Jones to Smith, making to all parties just allowances, with authority to examine the parties on interrogatories touching the said matters in controversy.

Pending the reference, the defendant, Wood, filed a cross-bill, to which an answer was put in by the original complainants. The parties filed their statements of charge and discharge before the master. David C. Wood was examined on interrogatories; testimony was taken on both sides; and after a full examination of the whole case, the master, on the 25th June, 1829, made his report, that there was due on that day from David C. Wood to Edward Smith, the sum of four thousand nine hundred and twelve dollars and ninety cents, and from David C. Wood to Hollingshead and Platt, the sum of twenty thousand four hundred and seventy-eight dollars and fifty cents.

To this report of the master, both parties filed exceptions, the purport of which appears in the opinion of the court. The exceptions were argued at the last term, by

*L. Q. C. Elmer*, and *I. H. Williamson*, for the complainants in the original bill, and by

*G. Wood*, and *G. D. Wall*, for the defendants.

THE CHANCELLOR. I shall consider the exceptions in the order in which they were presented to the court.

And first, as to the exceptions filed by defendant, David C. Wood.

The first is—That the said master, in and by his said report, hath charged the said defendant, in schedule A. "by amount paid

D. Souders, as per exhibit 18 of complainant, and paid for defendant, by E. Smith, four hundred and forty dollars and eleven cents. Interest from May 29th, 1820, when paid, till May 14th, 1821, when the first note was paid, twenty-nine dollars and fifty-two cents; equal to four hundred and sixty-nine dollars and sixty-three cents. Whereas the said defendant apprehends that the said master ought not to have charged him with the same, because it was paid, if paid at all, without the approbation of the said defendant; and it was settled, or ought to have been settled and charged in the account of Smith and Wood; and because it was expressly appropriated as a payment in discharge of Jones's mortgage, and could not be appropriated by said Smith; and because it is no lawful item in the said account."

Schedule A. referred to in this exception, and which is appended to the report, contains the master's statement of the amount of principal and interest due on all the bonds, on the 8th February, 1823, when the three last bonds were assigned by Smith to Hollingshead and Platt. According to this statement, the amount due from Wood to Smith, on all the bonds, at that date, was forty thousand three hundred and sixty dollars and nine cents. In ascertaining this amount, the master, after computing the interest, deducts therefrom the several payments made to Hollingshead and Platt, by Wood and his agents, either in money or notes. Among the several items of payment, there are placed under the date of 14th November, 1820, two several notes of Samuel G. Wright, one payable May 14th, 1821, for two thousand three hundred and twenty dollars and seventy-seven cents; the other payable June 14th, 1821, for two thousand three hundred and thirty-two dollars and seventy-nine cents; making in all, four thousand six hundred and fifty-three dollars and fifty-six cents. It appears that instead of lessening the interest then due, by the amount of those two notes, the master has deducted from that amount the sum of four hundred and forty dollars and eleven cents, being so much paid by Smith to Philip Souders, for and on behalf of the defendant, Wood: and he has also deducted the further sum of twenty-nine dollars and fifty-two cents, being interest on the payment to Souders, the same having been paid before Wright's notes became due. The defendant insists that this is a mis-appropriation on the part

of Smith; that the whole amount of those notes should have been applied to the payment of the Jones bonds; and therefore, that the deduction made by the master is incorrect.

On the other hand, it is contended by the complainant, that not only is that deduction right, but that other deductions should have been made by the master: that he should have deducted from said notes the sum of one hundred and fifty-three dollars and fifty-six cents, for the discount or interest thereon; and the sum of seven hundred and eighty-one dollars and eighty-four cents, for the amount of David C. Wood's note to Jones and Smith, and interest thereon; and should have allowed only the sum of three thousand two hundred and sixty-five dollars and ninety-five cents, as a credit on said bonds and mortgage, that being the amount of credit endorsed on the same by the complainants. This alleged omission of the master is made the ground of the first exception to the report on the part of the complainants. These two exceptions relate to the same subject, and will be considered together.

There is no doubt as to the receipt of this money by Smith; the difficulty is in the appropriation.

It appears that Samuel G. Wright was a tenant of David C. Wood. On the 13th day of December, 1819, he rented the furnace and lands, and a farm in Burlington, called the Green Hill farm, of Wood, for one year from the 1st of January, 1820, By this lease, he bound himself to pay, in the first place, certain sums of money to Wood, then certain claims against Wood and the property, and after paying expenses, commissions, and all other charges, to pay the remaining balance, or nett proceeds of the blast of 1820, when collected, if any there should be, to Edward Smith, *on account of his claim against David C. Wood, and the Millville furnace and property, or such part as might then be due.* It is from this agreement that Wright derives his authority to pay any money to Smith. Upon clear and ordinary principles, Wood had a right to appropriate the money thus to be paid on his behalf. It is well settled that the person making payment has the right of directing its application to the discharge of any particular demand he may think fit, provided he does it at or before the time of making the payment: but if the payment is made generally, without any such direction, then the person receiving, may apply the pay-

ment to any demand in his hands, against the person by whom, or on whose account, the payment has been made. Within the year, and during the existence of the lease, viz: on the 14th November, 1820, Smith agreed to accept of Wood, in lieu of the balance so to be paid to him as aforesaid, the two notes of Samuel G. Wright, heretofore described, amounting to four thousand six hundred and fifty-three dollars and fifty-six cents; and authorized Wright to pay over to Wood any balance that might remain after paying the amount of the notes.

On the 29th May, 1820, Edward Smith paid to Philip Souders, in part discharge of a judgment he had against Smith and Wood, four hundred and forty dollars and eleven cents. This judgment was obtained on one of the bonds they had given to Souders, for the purchase money of part of the furnace property. The mortgage accompanying the bonds, was a lien on this part of the property; and it appears that when Smith sold to Jones his moiety, he took from Jones a mortgage of indemnity upon the whole premises, to secure him against any claim that might be made against him on these outstanding bonds. When, therefore, Smith paid this money on the judgment, he had a perfect claim against the Millville property for indemnity. Jones was equitably bound to pay it, as the owner of the equity of redemption. After the sale to Wood, he stood in the place of Jones. Neither of them having paid it, and Smith being legally called on, and having satisfied it, had a legal right under the agreement, as I conceive, to pay this claim out of the first moneys he might receive from Wright. The application was in strict conformity with the agreement, and the appropriation of Wood himself; and the report of the master is correct, unless another objection raised by the counsel of Wood, shall prevail.

It is objected that the debt due to Souders by Smith and Wood, grew out of a partnership transaction, and is not to be brought in question here; that the partnership concerns are still unsettled; and that we have nothing to do with any other matter than the bonds and mortgage of Jones. It may be the case that this property was purchased of Souders for partnership purposes, and that the partnership concerns, strictly speaking, are not fully settled; and yet not follow of necessity that this payment is to be considered as the payment of a partnership debt.

I do not think it necessary now to inquire, how this real property might have been considered in equity as between the partners themselves, during the existence of the partnership, or afterwards as between the partners and creditors. The law upon the subject does not appear well settled either in England or this country. Lord Thurlow held, in *Thornton* v. *Dixon*, 3 *Bro. C. C.* 199, that upon the dissolution of a partnership, the property would result according to its respective nature; the real as real, and the personal as personal: and of this opinion was Sir William Grant, the master of the rolls, in *Balmaine* v. *Shore*, 9 *Ves. jr.* 500. On the contrary, Lord Eldon is represented, in 2 *Dow*, 242, to have stated it as his opinion, that all property involved in a partnership concern, ought to be considered as personal. And in the late case of *Townsend* v. *Devaysnes*, cited in *Gow on Part.* 54, and 1 *Montague*, 97, this doctrine appears to be supported by the opinion of the court. In New-York and Massachusetts it is held substantially, that real estate owned by partners, is to be considered and treated as such, without any reference to the partnership; and that the same would go, on the death of either of the partners, or the insolvency of the firm, to pay their respective creditors at large; 15 *John.* 159, 11 *Mass.* 469; while in Virginia, such property will be considered strictly as partnership property, save only as against purchasers and incumbrancers without notice. 2 *Munf.* 387.

In the case before the court, there are no claims of creditors interfering and to be settled; and it is manifest that this property was not considered by the parties as partnership property. When, after the dissolution in 1816, they sold to Jones, they sold separately, and for different prices. They conveyed by separate instruments, each conveying a moiety. Jones, as the purchaser of the equity of redemption, became bound to pay off Smith's moiety of this debt to Souders, as well as Wood's, without any reference to their partnership transactions: so also did Quinby; and Wood, who purchased the whole from Quinby, stands in the same situation. Accordingly we see that Wood has actually paid off and satisfied the whole of this outstanding incumbrance on the property, with the exception of this small sum of four hundred and sixty-nine dollars and sixty-three cents; and that too with his own funds. It appears also from another circumstance, that at

the time of the dissolution of the partnership, the debt to Souders was not considered by them as a partnership debt. It is not contained in the list of debts made out at the time and signed by the parties; and in the articles of agreement then entered into, provision is made for the payment of the partnership debts out of the partnership funds, i. e. stock on hand, and outstanding claims; but not for the bonds which had been given jointly and severally. These were to be paid by each party paying his half. Smith had already provided for the payment of his moiety; Jones, the purchaser was bound to pay it for him, and had indemnified him against any claim growing out of his (Smith's) original liability. I consider the appropriation to have been properly made, and that this first exception of the defendant must be disallowed.

The first exception of the complainants is connected with this part of the case, and will now be considered. The complainants insist, that out of these notes of Wright should be deducted the further sum of seven hundred and eighty-one dollars and eighty-four cents, for the amount of David C. Wood's note to Jones and Smith, and interest thereon. This note had been paid by Smith, and it was admitted to be a note given in lieu of a partnership note, that was to be paid by Wood. Smith having endorsed and paid the note, had a just claim against Wood for the amount: whether he could retain it out of the proceeds of Wright's notes, depends on the construction to be given to the lease or agreement between Wood and Wright. In that agreement it was stipulated that the nett proceeds of the blast of 1820, should, after making thereout certain deductions, be paid to Edward Smith, "on account of his claim against David C. Wood and the Millville furnace and property, or such part as may then be due." This language, taken in connection with the circumstances of the case, is not very explicit. Taken literally, it would seem to apply to no claim save such as Smith might have against David C. Wood and the property jointly; i. e. David C. Wood and the property being both liable to pay it. Now, strictly speaking, there was no such claim. It does not satisfactorily appear that Wood was even personally and legally liable to pay the bonds of Jones, although he bought the property subject to them. This literal construction does not suit the views of either

party, and cannot be taken as the true one. The complainants say it must be taken to mean, that the surplus shall be applied to the payment of Smith's claim, either against Wood or against the furnace property. The other party insists that it means Smith's claim against the furnace property in the hands of Wood; and which, as the owner of the equity of redemption, he was in a certain sense liable to see paid, as a part of the consideration of the purchase. I think this latter construction is the true one, not only from the words of the agreement itself, but also from the fact that both parties appeared to consider the proceeds of that property as pledged for the payment of the claim that Smith had against it. The note of Wood, that was taken up by Smith, grew out of the partnership transactions, and I think it was clearly the intention of the parties at the time, to keep that property clear from the concerns of the partnership. The opinion is confirmed by this circumstance; the agreement for the next year between Wood and Wright is, so far as relates to the payment of the surplus to Smith, in precisely the same words. David C. Wood afterwards represented to Smith, that the profits of the blast of the next year, (1821,) to be applied to him, would exceed ten thousand dollars. Whereupon Smith addressed a letter to Wright, informing him of this, and proposed that Wright should give him, Smith, a note for ten thousand dollars, drawn in favor of David C. Wood, which note he said he would accept, "and place the proceeds on the bonds as a credit on account of his lien against the Millville furnace property owned by David C. Wood, subject to his claim against said property." This is very explicit, and in my opinion shows clearly what was meant by the parties, in speaking of the claim "against David C. Wood and the Millville furnace and property."

But it is said that the appropriation was made by Smith at the time, and that Wood knew of it; that in 1825, he made arrangements for paying the interest on the bonds in the hands of Hollingshead and Platt, and must have then known that the whole of the money paid by Wright had not been applied to those bonds; that he made no objections, and of course ratified the appropriation. If this be true it will alter the case, but it should be clearly shown. What are the facts?

On the 14th November, 1820, Smith received of Wright his two notes, the cash value of which was four thousand five hun-

dred dollars. After deducting the payment on the Souders claim, and also the payment of David C. Wood's note to Smith and Jones, he endorsed one thousand nine hundred and ninety-four dollars of the balance on the bond that became due in 1818, and the residue, one thousand two hundred and seventy-one dollars and ninety-five cents, on the bond that fell due in 1819. In July, 1823, the three bonds for ten thousand two hundred and ninety-six dollars and ten cents each, were assigned over by Smith to Hollingshead and Platt, with the interest from the 8th February, 1823. It appears by Wood's letter to Smith of 7th February, 1825, that the interest on these bonds remained unpaid, and that Smith was about to proceed by ejectment against the property. Wood then wrote to Smith that he was willing to make an arrangement with Hollingshead and Platt, respecting the interest, and that they would take his note for the two years' interest, he paying the discount, if Smith would not proceed against the property. On the 12th February, 1825, Wood gave to Hollingshead and Platt his note for four thousand three hundred and twenty-four dollars and thirty-six cents, being just two years' interest on the three bonds of Hollingshead and Platt; and it was insisted that at this time Wood must have known that the whole of the notes of Wright had not been applied to these bonds. The force of this argument is not perceived. It was never pretended that the money raised from Wright's notes, even if it had all been appropriated to these bonds, would have paid any part of the principal. When the assignment was made from Smith to Hollingshead and Platt, the amount that had been paid for interest, or what interest was in arrear, was not a subject of inquiry. They took an assignment of the principal of the bonds only; all the interest due on those bonds up to 8th February, 1823, belonged to Smith, and not to Hollingshead and Platt. And in like manner, when Wood gave his note to Hollingshead and Platt, in February, 1825, the amount of the note did not at all involve the inquiry whether any, and if any how much, back interest was due on the bonds at the time of the assignment, or whether Wright's notes had been applied to those bonds or not. The note given was for two years' interest precisely. If at that time a note had been given by Wood to Smith for the arrears of interest due to him, we might have ascertained to a certainty whe-

ther Wood knew of the manner in which the Wright notes were applied; for in the calculation of the amount of such interest, the moneys paid by Wright must necessarily have come in question. This was not done, and I have seen nothing to satisfy me that the application made by Smith was ever sanctioned by Wood.

As to the discount claimed on Wright's notes, the one being payable at six months, and the other at seven months, I think the master was correct in disallowing it. Wright was originally to pay the net proceeds of the blast to Smith as he received them: Smith took those notes in lieu of them; and they were no more than assumptions, that certain fixed portions of the proceeds should be paid to Smith at the several times mentioned in the notes respectively; and they were to be appropriated when they became due.

The result is, that the first exception on the part of the complainants, as well as the first exception on the part of the defendant, must be disallowed.

This view of the case decides the second exception on the part of the complainant, and the sixth exception on the part of the defendant, both of which are disallowed.

The second exception on the part of the defendant is as follows: That the said master hath not charged the complainants, and allowed credit to the defendant, for two thousand two hundred and sixty-nine dollars and fifty-nine cents, the amount of proceeds paid by Clayton Earl, on Wood and Bacon's note, dated 1st February, 1818; the payments as follows:—

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|---|---|
| January 13, 1821, | $1,000 00 |
| February 5, 1821, | 398 31 |
| September 11, 1821, | 871 28 |
| | $2,269 59 |

The eighth exception is, that the master has not charged the complainants with, and allowed credit to the defendant for, two thousand dollars, Wood and Bacon's note, which was received by complainants, and ought to have been credited on the mortgages.

These two exceptions relate to the same subject matter, and will be considered together.

The case and evidence show that Clayton Earl was in possession of this furnace property for four years next preceding the

time in which it was occupied by Wright; that is, from 1816 to 1820. His accounts current for each of the four years have been exhibited by the defendant; but I have not been able to find any written agreements between Wood and Earl, as to the terms of their several contracts, as there were afterwards between Wood and Wright. That being the case, the rent or proceeds of the property must be considered as due to Wood personally and unpledged, and subject to such order and appropriation as he might make from time to time. It appears, however, that in March, 1818, Wood gave an order on Earl in favor of Edward Smith, for two thousand five hundred dollars, payable out of the proceeds of the first and second blasts of the furnace, and another for ten thousand dollars, payable out of the proceeds of the third blast. These drafts were accepted by Earl, subject to some prior acceptances, and passed over to Smith, who gave his receipt for them, when paid to be applied, first to pay interest, and next so much principal, on Joseph Jones's bonds and mortgage, on the Millville furnace and property. Here was an express appropriation of funds to that amount, and all parties were bound by it, unless it was altered by mutual consent. So long as the rights of third persons were not affected, they were at liberty to make any alteration that would better suit their views, or tend more to their advantage. Let us examine, then, whether any such alteration was made in regard to these funds as will warrant this payment to Smith for the purpose to which it was applied.

On the 19th February, 1818, Clayton Earl addressed a letter to Wood and Bacon, informing them that Edward Smith and William Jones, creditors of David C. Wood, required a reduction or payment of one thousand six hundred dollars to be made on Wood's notes, on which they (Wood and Bacon) were endorsers, besides one thousand three hundred and fifty dollars which Smith required to be paid on the Souders bonds. These sums, he remarks, are more than he had intended to engage to pay, but he had told David C. Wood that if he would give him (Earl) Wood and Bacon's note for two thousand dollars, payable 1st February next, he would then engage to pay those sums; and that the note was to be held as collateral security, and not to be made use of, if he could reimburse himself from the proceeds of the furnace by that time, or even a

little longer. A note was accordingly drawn by Wood and Bacon, in favor of Clayton Earl, for two thousand dollars, payable 1st February, 1819. This note was afterwards endorsed by Clayton Earl, to Edward Smith or order, without recourse to him. When this was done, does not appear from the endorsement; but Earl says, in his examination, that after he (Earl) received the note, he declined paying Edward Smith the amount he had agreed to pay him, though much pressed by Smith for the money, but that he passed the note itself to Smith, and afterwards paid it off in different payments, as appears by the endorsements on the note. Earl says further, that he believes Wood, the defendant, was present when this was done, but he will not be positive: he can say this much, however, that it was made known to David, and he never made any complaint. He says that it was an understanding between D. C. Wood, and Wood and Bacon, and himself, that he should pay the amount of this note to E. Smith, as he should have funds to meet it. He did not understand from either of the parties, that this note was to be applied to the payment of Jones's bonds. His impression was, "that it was to liquidate certain debts which Ed. Smith had paid for D. C. Wood at the different banks; that they had dissolved their partnership and lessened those notes which were to be paid and were coming due; and that when David could not meet those which he was to pay, Edward had paid them, and that there was a running account between them for the moneys so paid." On his cross-examination, the witness says; "I recollect no distinct agreement between Mr. Smith and Mr. Wood, as to the manner in which this two thousand dollars was to be appropriated, when it was paid to Mr. Smith. The impression of which I have spoken in my principal examination, results from David C. Wood having frequently applied to me for small sums of money, to meet the reduction of his notes at the different banks. Sometimes I accommodated him, and sometimes I did not." In connection with this testimony, there is an account current between Wood and Smith, which is in evidence, and shows that this note was appropriated by Smith at the time, and in what way. By this account it appears, that on the 9th May, 1818, Wood was indebted to Smith for moneys loaned him to

pay discounts and take up notes endorsed by Smith, in the amount of three thousand six hundred and one dollars and eighty-nine cents. On the same 9th of May, Smith credits Wood with the amount of Wood and Bacon's note, less the discount for nine months, at which time it would be due; and on the same day he credits Wood with Wood's own note of same date, for one thousand seven hundred and eighteen dollars and thirty-nine cents, less the discount, equal to one thousand six hundred and ninety-one dollars and eighty-nine cents cash, which he says is the balance of the account due him, after crediting Wood and Bacon's note. Adding together those two notes, the sum exactly corresponds with the amount then appearing to be due from Wood to Smith, on their running account. It appears also by Wood's own note book, that this last note for one thousand seven hundred and eighteen dollars and thirty-nine cents, was actually given by him to Ed. Smith on the 9th of May, 1818. If this last note was given by Wood understandingly, and we are not at liberty to dispute it, it is hardly possible to escape the conclusion that he knew of the purpose to which the Wood and Bacon note was to be applied.

If all these circumstances, taken in connection, do not prove an absolute agreement between the parties, they do at least lead to a satisfactory conclusion, that this appropriation was made with the express knowledge and consent of Wood; and having already received a credit for the amount, it would be unjust that he should be allowed it again, as a payment on the mortgage.

Under this view of the case, the second and eighth exceptions of the defendants are disallowed.

The third and fourth exceptions of the defendants relate to two several drafts of David C. Wood on Clayton Earl, and in favor of Edward Smith, for ten thousand dollars each.

The first draft is in the following words:—

PHILADELPHIA, March 9, 1818.

To CLAYTON EARL.

When in funds, after reimbursing your advances which you have already made, or may hereafter make, for carrying on the ensuing contemplated blast at Millville furnace,

Please pay to Edward Smith or order, ten thousand dollars, or

as much thereof as may remain in your hands after reimbursing yourself the above advances, and paying my draft in favor of Henry B. Kemble, for nine hundred and seventy-nine dollars, and oblige

$10,000. DAVID C. WOOD.

This draft is accepted by Clayton Earl, as follows:—Accepted March 9, 1818. CLAYTON EARL.

It appears by the receipt given by Smith to Wood for the draft, that the acceptance was on the draft when he received it; and in the receipt Smith promises that the draft, when paid, or any part thereof, shall be applied first to pay interest, and next so much principal on Joseph Jones's bonds, secured by mortgage on the Millville furnace and property. Five several payments were made on this draft between the 16th January, 1822, and the 17th June, 1823, inclusive, amounting in the whole to three thousand one hundred and thirty-three dollars and sixty-nine cents; leaving a balance unpaid of six thousand eight hundred and sixty-six dollars and thirty-one cents. The master, in taking the account, has charged the complainants only with the sums received on the draft, and not with the amount of the draft itself. The defendant, Wood, alleges that this is an error, and insists that the complainant, Smith, by his own acts made himself accountable for that sum; that Clayton Earl received more than the amount of the draft on account of the blast, and that Smith was requested by the defendant to proceed against Clayton Earl for the same; and if the balance of the draft has been lost, it has been owing to the neglect, negligence and default of the said complainant.

In order to ascertain the rights and duties of the parties, it becomes necessary to inquire into the nature of the instrument given by Wood to Smith, and accepted by Earl.

It is not a regular bill of exchange: it is payable out of a particular fund; which is contrary to an established principle regulating that kind of commercial paper, that the credit is given to the drawer or endorser, and not to the fund. The acceptance being general, does not alter its character. The acceptance must necessarily follow the nature of the draft. *Dawkes* v. *Deloraine*, 3 *Wils.* 213.

Again—This order or draft did not go to extinguish the precedent bond debt. On the receipt of this order by Smith, Wood

could not have compelled Smith to credit the amount of it on his bonds. The receipt given by Smith to Wood at the time, precludes that idea. But independently of that, the law is well settled, that the acceptance of such an order is no payment of a precedent debt. 1 *Salk.* 124; *Ward* v. *Evans,* 2 *Ld. Ray.* 928; *Smith & Marshall* v. *Rogers,* 17 *John. Rep.* 340.

Our statute relating to bills of exchange and promissory notes, has no application to this case. The enactment contained in it—that the acceptance of an inland bill of exchange, in satisfaction of a former debt, shall be accounted a payment, if the person accepting it do not take his due course to obtain payment by endeavoring to get the same accepted and paid, and make his protest in case of non-acceptance or non-payment—does not affect the question. This instrument, as we have seen, was not a bill of exchange; and there could be no protest for non-payment, for the time of payment was altogether indefinite.

But it is contended on the part of the defendant, that although this is not a bill of exchange, strictly speaking, under the statute of Anne, and though the acceptance of it did not operate as a payment of the precedent debt, yet that Smith, the holder, has been guilty of laches. He ought to have shown that he had used reasonable diligence to collect the money, and that he gave notice to Wood of the non-payment; that not having done this, he has by his own conduct made the acceptor his debtor. In support of this position the case of *Chamberlyn* v. *Delarive,* 2 *Wils.* 353, is relied on. In that case, the defendant being indebted to the plaintiff, in eighteen pounds, for work done, gave the plaintiff a note or draft upon one Heddy, desiring him to pay the plaintiff a few days after date, eighteen pounds, for value received. The plaintiff took, and held the draft, four months, and never applied to Heddy to demand the money of him. Heddy then broke and became insolvent. The court held, that the plaintiff, by accepting this note or draft, undertook to be duly diligent in trying to get the money of Heddy, and to apprize the defendant if Heddy failed in payment; and that the defendant had been deluded into a belief that the plaintiff had got the money of Heddy. The court say further, there is no reason applicable to the case of holding a bill of exchange, that is not appli-

cable to that case; the plaintiff, by holding this order four months, has discharged the defendant of his debt, and credited Heddy in his stead.

There can be no doubt, that the true question in the cause now before the court, is, whether the acceptance of the draft, under the circumstances attending it, imposed on Smith the duty of using reasonable and due diligence in collecting it; and whether such diligence was, or was not used.

The case from 2 *Wilson*, goes far to show the necessity of diligence on the part of the holder: but it differs from this, in some very important particulars. It was a general draft, not payable out of any particular fund, and not dependent on any subsequent contingency. The credit was given to the person who was to pay, and not to the property out of which it was to be paid. It was due at a particular time, and notice of non-payment could have been given, because the time of payment was fixed. The only distinction between it, and a regular bill of exchange, was, that it was not payable *to order*. Still it was a case not within the statute, and the principles of mercantile law were not applied to it by the court, and therefore it is entitled to some consideration.

*Clark* v. *Mundal*, 1 *Salk.* 124, was before the statute of Anne. The court held, that the receiving of a bill of exchange, should never go as payment of a precedent debt, although it had lain long in the hands of the person receiving it after it was payable, and had been reckoned as money paid, and in his hands.

The case of *Smith & Marshall* v. *Rogers*, 17 *John.* 340, is in principle very similar to the present.

Smith and Marshall sold to Rogers and Bemont, in April, 1816, a quantity of merchandise. On the 22d April, 1816, Bemont wrote to them that the partnership was dissolved, and that he had assumed the demand, and would pay it as soon as possible. The plaintiffs answered, that they were satisfied with that arrangement. On the 9th July, Bemont sent to the plaintiffs one hundred dollars, to be applied to the payment of the debt. In August, he gave his own note to the plaintiffs for six hundred dollars, payable on demand, for which the plaintiffs gave him a receipt, when paid, to be placed to the credit of Rogers and Bemont's account. In November, 1817, Bemont became insolvent,

and then, and not before, was Rogers, the partner of Bemont, called on for the payment of the balance of the account. No suit was brought against Bemont, for the recovery of the note, The court held, that taking the note was no discharge of the original debt; that the liability of the firm still continued, and that by the consent of all parties, as manifested by the receipt given; that it was the duty of Rogers to see that Bemont complied with his engagement, as to the payment of this debt; and that the plaintiffs were in no default, for omitting to call on Rogers until Bemont's insolvency.

I think this is the correct rule, as applicable to the present case. Wood's debt to Smith remained, notwithstanding the order. Earl contracted with, or promised Wood, to pay to Smith, ten thousand dollars of Wood's debt. It was clearly a contract between Earl and Wood; Smith receives it from Wood with the acceptance on it, and promises to apply the money in a particular way, whenever Earl shall pay it. On whom, then, devolved the duty of seeing that the money was paid? Could Smith sue Earl on this acceptance? At what time could he have brought his suit? How was he to make out when Earl was in funds, after reimbursing his advances and prior acceptances? When was he bound to notify Wood, that Earl had not paid the order? And after such notification, what course was he to pursue to obtain his money? My opinion is, that, even if Smith had made no one effort to procure the money of Earl, he would not be chargeable with any loss, and the present claims upon the bonds would be unimpaired. This opinion applies equally to the draft of 1819, which was similar in its character to the first, and on which nothing has been paid.

Let us now examine, whether it be true that Smith, after receiving these drafts, folded his hands, and waited the movements of Clayton Earl, without making any efforts to induce payment.

Earl, in his examination, says, that Smith importuned him very much for money on the drafts, and told witness, that from his own accounts, there was more than enough in his hands to pay the ten thousand dollars. Witness replied, that he could not hold two securities at once; that if he (Earl) was pressed to pay the money, that Smith should assign over to him one of the ten thousand dollar bonds. Samuel G. Wright says, he

has often heard Smith and Wood talk about the drafts that Wood had given to Smith, on Clayton Earl; and Wood would ask him, why he did not sue Clayton. These conversations occurred frequently, and Wood would turn Smith off, by saying, why don't you sue Clayton. This was during the years 1820, 1821, 1822. When Wood would ask Smith why he did not sue Clayton, Smith would reply, that Clayton said he had no funds. From this evidence, it cannot be doubted, that Smith made frequent applications to Earl for the payment of the drafts; and that Wood knew they were unpaid; and knowing they were unpaid, and that Clayton refused payment, and alleged the want of funds, it was his duty to have taken up the drafts, and made Earl account to him for the funds. Even if negligence could lawfully be charged, in a case of this kind, against Smith, I am of opinion the evidence does not present that gross default, which would render Smith wholly responsible for the amount due on these drafts, and compel him to credit it on the bonds. I do not think, that even Wood himself, could at that time, have seriously pretended that Smith, holding as he did the mortgages in his own hands, was bound to enter into a protracted litigation with Earl, which must have involved all the accounts between Earl and Wood.

It appears, however, that on the 1st of March, 1825, after the various conversations that have been mentioned by the witnesses, Wood addressed a formal letter to Smith, enclosing, as he says, the accounts current, showing the amount of funds in Earl's hands, at that date, to be sixteen thousand nine hundred and nineteen dollars and fifty cents; and informing Smith, that he shall expect him to account for that amount, on the three orders drawn by Wood on Earl, in favor of Smith—one for two thousand five hundred dollars, and the others for ten thousand dollars each. To this, Smith replied, that he did not hold himself liable for any sum in Earl's hands, until he received it, and then it should be applied to pay the Jones bonds; and asks direction how to proceed if Earl should object to the balance. Very soon after, Smith exhibited the account to Earl, who denied the correctness of it, and alleged, that on a settlement there would be a balance in his favor.

If Wood really considered Smith liable for the amount of these

drafts, (in the whole, twenty-two thousand five hundred dollars,) he must have considered, that so much was paid on the bonds; and of course, that they were reduced by that sum. One of the large bonds must then have been paid off, and the greater part of another; and yet we see, that on the 12th February, only sixteen days before, he had made formal provision for the payment of the whole interest due on the three large bonds, and which were assigned over to Hollingshead and Platt; and actually gave to Hollingshead and Platt his own note for the precise amount. Now, Wood must have known, at that time, that neither of the drafts of ten thousand dollars, had been applied to these bonds. What occurred in the interim, between the 12th of February and the 1st of March, either to fix the liability of Smith, or to alter the views of Wood, does not appear. On the whole view of this part of the case, I am satisfied, that it was never the intention of the parties, that Smith should be charged with the amount of these drafts, unless the money was received from Earl; and that they were viewed by them as special agreements, (as Wood himself calls them,) between Wood, and Earl, and Smith; whereby, Wood agreed to appropriate a certain portion of the proceeds of the property, to the payment of Smith; Earl agreed with Wood to pay it according to his direction; and Smith agreed to receive it, whenever it should be paid, and make of it a proper application.

The third and fourth exceptions are disallowed.

The fifth and seventh exceptions were not insisted on.

Let the report stand confirmed.

CITED *in Edwards* v. *Derrickson*, 4 *Dutch.* 67.

# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

## STATE OF NEW-JERSEY,

OCTOBER TERM, 1830.

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### ZULE v. ZULE.

Where, upon a bill filed by the wife, for a divorce, *a mensa et thoro*, on the grounds of cruelty and desertion, it appears from the evidence, that the defendant had a former wife, living in Scotland, at the time of the marriage with complainant, a case is presented entirely different from that made by the bill, and no decree can be made. The bill dismissed, but without costs.

In such case, the second marriage is invalid from the beginning, and absolutely void; the first contract still existed; it was not affected by the fact, that the husband and wife resided in different quarters of the globe; nothing save death, or the judicial sentence of some competent tribunal, can dissolve the marriage relation.

A divorce, *a mensa et thoro*, presupposes an existing valid marriage between the parties. It is founded on some fact, subsequent to the marriage, and does not dissolve the relation. It consists with a subsequent reconciliation of the parties, as well as subsequent cohabitation on proper terms.

A decree for a divorce, on the ground of a prior marriage, is different from decrees of divorce, *a vinculo matrimonii*, for other causes. It proceeds on different principles, and is more disastrous in its consequences. It considers the marriage null and void; the connection between the parties meretricious, and not connubial; and the children illegitimate, and subject to all the legal disabilities of illegitimate issue.

*Semble*, that in such case, the complainant would be entitled to the property she possessed before the supposed marriage, if it remained unexpended, or undisposed of.

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Elizabeth Zule, filed her bill of complaint, against William Zule; in which she states, that they were lawfully married in New-York, in 1807; that the defendant treated her with ex-

treme cruelty; sold their property and furniture, and deserted her, and has obstinately continued to desert her, for nine years, and married one Catharine Gulick, with whom he has since lived; in consequence of which he was indicted for polygamy, &c.; and prays for a divorce from bed and board, and for alimony.

The defendant, in his answer, admits his marriage with the complainant, but alleges that, at the time, he had a wife living in Scotland, and the marriage with complainant was void: he denies that he treated her with cruelty, and says that the complainant voluntarily left his house, and he had solicited her to return; that, after the death of his first wife, he was lawfully married to Catharine Gulick.

Witnesses were examined, and the cause heard upon the bill, answer, and proofs.

*W. Halsted*, for the complainant.

The marriage with the complainant is admitted. There are two grounds of divorce charged in the bill. 1. The marriage with Catharine Gulick, which is admitted. 2. Cruelty and desertion, which are evasively denied, but sufficiently proved. The answer of the defendant discloses another ground. He says, that the marriage with the complainant is void, as he had a wife living in Scotland at the time. This is not a defence, but a gross aggravation of the case: it exhibits a degree of turpitude in the defendant, of which the complainant was not before apprized, and is, of itself, sufficient to justify a divorce, on the ground of pre-contract. *Rev. L.* 667, *Sec.* 3; 3 *Kent's C.* 81; 2 *Phillim. R.* 16. It is unconscionable, that the defendant should have had the complainant's property, and not be liable for her support. She is entitled to alimony.

*P. I. Clark*, for the defendant.

We appear not as the apologists of the defendant, but to place him on his legal rights. The marriage of the defendant in Scotland, and that his wife was living there at the time of

his marriage with the complainant in New York, is sufficiently proved. It follows, there was no lawful marriage with the complainant. She is not the wife of the defendant, and has no right to come into court in that capacity. The complainant's bill cannot be sustained: without a lawful marriage there can be no divorce, and without a divorce no alimony. 2 *Phil. R.* 18, 19.

*G. D. Wall*, on the same side.

The governing principle in cases of divorce, is, that the allegations or admissions of the parties, are not to be taken, under oath, or without oath. 2 *Phil. R.* 164. There is no proof of cruelty, and the charge of desertion is sufficiently answered. The complainant insists on a valid marriage between the defendant and herself: on this, her case entirely depends. In answer to this, it is competent for us to set up the fact of a prior marriage in Scotland. 2 *Phil. R.* 321. Without a legal marriage there can be no alimony, even if the court should decree a divorce.

*Halsted*, in reply.

The desertion is sufficiently proved, and the facts constituting the cruelty, are admitted by the answer, which we insist is good evidence. The second marriage, although invalid, may be the subject of divorce. "Pre-contract," under our statute, is a ground of divorce "from the bond of matrimony." The court, therefore, have power to divorce, and upon that may give alimony.

THE CHANCELLOR. This case presents a singular state of things. The complainant alleges, that she was lawfully married to the defendant, in the year 1807; and lived, and cohabited with him, a number of years, as his lawful wife; that he afterwards treated her cruelly, spent all her property, and deserted her, and then married another wife, one Catharine Gulick, on account of which he was indicted for polygamy. She prays a decree of divorce from bed and board, together with an order for alimony and maintenance.

The defendant admits the marriage to the complainant, in 1807, but sets up that he was partially intoxicated, and did not know what he was about. That in the year 1796, he was lawfully married in Scotland, to one Christiana Shearer, by whom he had children, and who was still living in 1807, at the time of his marriage with the complainant; and therefore that the marriage with the complainant was wholly void. He denies the charges of cruelty and desertion, and admits the subsequent marriage with Catharine Gulick, and the indictment for polygamy.

The fact of the marriage in Scotland is fully supported; and I think it is sufficiently proved by the testimony, that the first wife was living at the time of the marriage with the complainant. If so, that marriage was, in the language of our statutes, invalid from the beginning, and absolutely void. The first contract still existed. It was not affected by the fact, that the husband and wife were resident in different quarters of the globe. The great principle on this subject, as recognised in all christian nations, is that nothing save death, or the judicial sentence of some competent tribunal, can dissolve the marriage relation. 1 *Blac. Com.* 440.

It is evident, the complainant's bill is not framed to meet such a case. She comes into court praying for a separation or divorce, *a mensa et thoro.* This always presupposes a pre-existing valid marriage: it is founded on some cause subsequent to the marriage, and does not dissolve the relation. It consists with a subsequent reconciliation of the parties, as well as a subsequent cohabitation upon proper terms. All this is totally inconsistent with the case before the court; and a decree of divorce, *a mensa et thoro,* would be as repugnant to the situation and rights of the parties, as it would be to the law of the land, and the feelings of the court. But such is the relief sought by the bill; while the only relief that consists with the case made, is a divorce, *a vinculo matrimonii,* on the ground of the prior marriage. Where there is a decree of divorce on this ground, it is different from other decrees of divorce, *a vinculo matrimonii,* growing out of other causes. It rests on different principles, and is more disastrous in its results. It considers the marriage null and void, and the connection be-

tween the parties meretricious, and not connubial: the children are deemed illegitimate, and subject to all the legal disabilities of illegitimate issue. Such decree cannot be made in this case as now presented.

Whether, if a proper case were made, and such decree rendered, the complainant would be entitled to alimony, it is not necessary now to consider. The rule in regard to property, seems to be, that the wife would be entitled to receive what she possessed before the supposed marriage, if it remained unexpended or undisposed of.

The bill must be dismissed, but without costs.

CITED *in Anonymous*, 9 *C. E. Gr.* 24.

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## HINCHMAN v. ADMRS. OF EMANS ET AL.

It is not a necessary consequence, when the legal and equitable titles meet in the same person, that the equitable title becomes merged in the legal. When the holder of a mortgage takes a release or conveyance of the equity of redemption, a court of chancery will consider the mortgage as subsisting, when the purposes of justice require it.

There are four species of fraud:—

1. Fraud may arise from facts and circumstances of imposition.
2. It may be apparent from the intrinsic value and subject of the bargain itself—such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other.
3. It may be inferred from the circumstances and condition of the parties contracting; for it is as much against conscience to take advantage of a man's weakness or necessity, as his ignorance: And,
4. It may also be collected from the nature and circumstances of the transaction, as being an imposition on third persons.

Where A., who held a mortgage and bonds, given for purchase money, in 1814, voluntarily relinquished the mortgage, cancelled the bonds, and took another mortgage for the same debt in 1817, knowing that an intervening mortgage on the same premises, given in 1816, was outstanding; and upon a sale of the premises in 1818, consented to give up his mortgage of 1817: and that B., the assignee of the outstanding mortgage of 1816, should take a new mortgage on the premises for his debt, as a first lien; and he, (A.) would take another mortgage, in place of his mortgage of 1817, as a second lien on the premises—and the two mortgages were executed accordingly,—B.'s mortgage bearing date on the 1st of April, and A.'s mortgage on the 2d April, 1818, and recorded in the same order, so as to give priority to the

mortgage of B.:—although A. was infirm at the time, and his faculties in some measure impaired, yet being attended by a friend who acted as his agent, and assisted in the transaction of the business, when the order of priority was spoken of and understood: even if the parties were mistaken in the principle on which they acted, (that B.'s mortgage of 1816 was legally entitled to a priority over A.'s mortgage of 1817,) without any concealment or misrepresentation on the part of B., it does not come within any of the descriptions of fraud; and A. or his representatives are not entitled to have B.'s mortgage of 1st April, 1818, postponed, so as to give priority to A.'s mortgage of the 2d of the same month.

Where the change of securities was voluntary, and it does not appear that any artifice was made use of, to induce him to take the second mortgage, A. cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of his ignorance of the legal consequences flowing from these facts.

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The bill in this case, was filed by Guy M. Hinchman, against Peter Wortman and Isaac Emans, administrators of Nicholas Emans, deceased, and the heirs of said Nicholas Emans, defendants.

The object of the suit was to obtain a foreclosure, and sale of certain mortgaged premises, in the county of Morris. The mortgage on which the bill was filed, was given by Japhet B. Chidester, to one Cummins Oliver, to secure the payment of one thousand one hundred and thirty dollars, and bore date on the 1st, and was registered on the 6th of April, 1818. Accompanying the mortgage, were four several bonds, given by Chidester to Oliver, for two hundred and eighty-two dollars and fifty cents, each. On the 1st of April, 1824, Oliver and wife, in consideration of one thousand five hundred and seventy-five dollars, assigned all their interests in the bonds, and mortgaged premises, to the complainant, subject to a certain agreement, between the said Chidester and Oliver, of the 16th of March, 1824; by which Chidester and wife, released to Oliver, their right, or equity of redemption, in the mortgaged premises,—and Oliver released to Chidester, all claim and demand, as against his personal property, of one of the bonds. On the 1st of April, 1824, the complainant took possession of the property, and received the rents and profits thereof, which have all been expended, as he alleges, in necessary repairs. The bill then charged, that the complainant had been informed, that the said Chidester, on or about

the 2d day of April, 1818, executed an indenture of mortgage to one Nicholas Emans, on the same premises, to secure the payment of one thousand and fifty-five dollars. Emans died in May, 1821, intestate, and letters of administration upon his estate were granted to Peter Wortman and Isaac Emans.

The defendants, in their answer, admitted that the mortgage and bonds were executed to Oliver; but denied that they were executed on the 1st day of April, or for a valuable consideration; and insisted that they were fraudulent and void, and not entitled to priority of payment, as against the bond and mortgage of the defendants. They alleged that, on the 1st day of April, 1818, the said Nicholas Emans held a mortgage on said premises, from one Jonathan Oliver and wife, given on the 27th day of May, 1817, to secure the payment of one thousand and fifty-five dollars and ninety-four cents, being part of the consideration money, for which Emans had theretofore sold the said premises. That after the execution and delivery of this last mentioned mortgage, Jonathan Oliver became embarrassed in his affairs, and gave a deed for the property to Cummins Oliver, the consideration of which was, that Cummins Oliver was to pay off the debt to Emans. On the 1st day of April, 1818, this mortgage was still outstanding and unpaid; and on the same first day of April, Cummins Oliver conveyed the mortgaged premises to Japhet B. Chidester, and proposed to Emans, who was then feeble and infirm, that he should take the bonds and mortgage of Chidester, in the place and stead of the bonds and mortgage of Jonathan Oliver, for the like amount, and with the same priority of lien, that he then had and held. That, to quiet all fears, and the more successfully to execute and accomplish his fraudulent designs, Cummins Oliver executed, and gave to Emans, a bond of indemnity, in the sum of two thousand dollars, to indemnify him against all incumbrances on the premises from the 19th of April, 1814, to the said 1st of April, 1818. That the said bonds and mortgage of Chidester, were accordingly given for one thousand and fifty-five dollars, and dated on the 2d of April, instead of the 1st, without the knowledge of the said Emans. The defendants further stated, that the bonds and mortgage given to Cummins Oliver, and mentioned in the bill, were not discover-

ed till afterwards, having been artfully concealed from Emans: that they were given under a pretended claim set up by Cummins Oliver, to the said mortgaged premises, by virtue of a mortgage given by one Jason King to Jonathan Oliver, which had come into the hands of Cummins Oliver, and which the defendants aver to be fraudulent and void, having been given by a person who never had any title to the premises, and this known to the said Cummins Oliver, who fraudulently caused the mortgage of Chidester to him, to be recorded before the mortgage to Emans, and is now seeking through the cover of an assignment, without consideration, to execute his fraudulent purpose. They stated further, that the complainant paid no consideration for the assignment, and that he had full notice of the mortgage of Oliver and Chidester to Emans; that he was present on the 1st of April, 1818, when the arrangement took place between Emans and Cummins Oliver, and subscribed his name as a witness to the bond of indemnity. The defendants admitted that the bonds of Jonathan Oliver to Emans were cancelled, but not the mortgage, which is now in their possession; and they insisted that they ought to be ordered to stand as an existing and prior lien on the property—or that the bonds and mortgage from Chidester to Emans should be first paid.

Evidence was taken on both sides, and the cause came on to be heard on the pleadings and proofs.

*Van Arsdale, sen.* for the complainant.

The mortgage under which we claim, was given by J. B. Chidester to Cummins Oliver, and by him assigned to complainant. It is dated 1st April, 1818, and recorded 6th April. The defendants' mortgage was given by Chidester to Emans, and is dated 2d April, 1818, and recorded the 8th April: upon the same premises, in point of date and registry, the complainant has the prior right. Before the execution of these mortgages, C. Oliver had two bonds and a mortgage, given by J. King, of 21st May, 1816, and N. Emans held bonds and a mortgage given by Jonathan Oliver, on the 27th of May, 1817, upon the same premises. C. Oliver then had the oldest mortgage. After the sale to Chidester, on the 1st April, 1818, the parties met, to give up the

old securities and take new mortgages in lieu of them. It was then understood and agreed, that C. Oliver's mortgage was to have priority, and Emans's to be the second lien on the property; and the present mortgages were executed accordingly.

The *first* point of defence, is, that the complainant's mortgage is falsely dated on the 1st April, when in fact it was executed on the 2d of April. The evidence (to which the counsel here adverted) proves that the mortgages were executed on the days they respectively bear date. The *second* point is, that the complainant's mortgage was not given for a valuable consideration. C. Oliver had paid the money and taken an assignment of the King mortgage, and two bonds of 1816, and paid other debts for Jonathan Oliver, who afterwards released to him the equity of redemption of the mortgaged premises; he conveyed to Chidester, and the mortgage of 1st April, 1818, is for purchase money on that sale. But the defendants say, King, who gave the bonds and mortgage of 1816, was not the person who had the title, and the bonds and mortgage were fraudulent: this they are bound to prove. Whatever is set up in avoidance of the plaintiff's claim, must be proved. 2 *John. C. R.* 89; 3 *Mason*, 390. The only witness adduced in support of this allegation, is proved to be unworthy of credit, and contradicted as to facts by other witnesses and documents that establish the validity of the mortgage. The *third* ground of defence is, that our mortgage was fraudulently procured to be first registered. The witnesses present at the execution prove that our mortgage was to have priority. But if the transaction of 1st April, 1818, was fraudulent, things ought to be restored to their original situation; we should then stand upon the King mortgage, of 1816, and still have the priority. Another objection will probably be raised, that Emans was incapable of business: this must also fail. From the evidence it appears he understood and assented to what was done. Wortman, now one of the defendants, was then acting as his agent, and assisted in transacting the business. Emans and his representatives are bound by it. *Paley on Ag.* 2, 138, 142, 143, 249; 1 *Livermore*, *A.* 45, 349; 2 *Liver.* 306, 249. They further pretend the assignment to the complainant was fraudulent. The evidence shows that the assignment was bona fide, and the complainant took the mortgage in his own right. *Lastly,*

they said that the complainant had notice of all these matters: of this there is no evidence.

*T. Frelinghuysen,* for the defendants.

We complain that an imposition was practised on a feeble old man, unable to take care of his rights. The argument for the complainant, is, that the King bonds and mortgage were a subsisting lien on the property in 1818, and the rights as to priority were not changed by the new securities. We insist that the King mortgage was not a subsisting lien in 1818. The first title paper in evidence is a mortgage on these premises, given by Howell to Emans, in 1809. Emans bought the property at sheriff's sale in 1812, and in June, 1814, sold it to Jonathan Oliver for one thousand and fifty dollars, and took the mortgage of that date for the purchase money. J. Oliver conveyed it to King in May, 1816, and took of him a mortgage and four bonds, two of which Emans got, probably as collateral security. On the 3d May, 1817, King re-conveyed the property to J. Oliver, who was to take up and deliver to King his two bonds outstanding, said to have been pledged to Condict and Halliday; and Cummins Oliver became security for his performance. On the 27th May, 1817, Jonathan Oliver renewed his mortgage to Emans for the original debt which accrued for the purchase money, in 1814; for which Emans always retained a lien on the premises, and this mortgage could not be affected by the intermediate mortgage of 1816, which was given subject to our lien. If Cummins Oliver paid over the King bonds to Halliday, the bonds ought to have been delivered up to King, and the lien of the mortgage was extinguished: instead of which, Oliver took an assignment of the bonds and mortgage. If this was *bona fide* upon Jonathan Oliver's releasing the equity of redemption to Cummins Oliver, the equitable and legal estates became united in him; the mortgage interest became merged in the legal estate, and the lien of the King mortgage was extinguished. We complain, that after all this, they should prevail upon this infirm old man, Emans, to give up his lien and suffer a prior mortgage to be given to Cummins Oliver, which would sweep away the whole property. The witnesses assign no reason why the mortgage to Emans was postponed,

except that it might have been that the King mortgage was the oldest; and one of them declares, he cannot say that Emans understood the mortgage to Oliver was to have priority, or that he heard the instructions given to the scrivener. There was no money paid, no consideration to induce Emans to give up his priority, and no one can account for it. This amounts to a legal fraud. 1 *Fonb. Eq.* 124, 164. No man in his senses, and not under some delusion, could have been induced to make such a contract. His situation, as described by the witnesses, rendered him liable to imposition, and from the fact of his incapacity, and nature of this transaction, the court would infer that some undue means had been used. Wortman, as a general agent, had no power to deal away the vested rights of Emans. They dealt with Emans, not with Wortman. He got no power of attorney, till September, 1819. We are in possession of two facts. 1. That we had the prior lien on the 1st April, 1818. 2. That Emans's mortgage was postponed by this arrangement, at a time when he was incapable of transacting business. But again, the mortgage of 1814 is still in our hands, uncancelled. Taking the after mortgage is no extinguishment. When two securities are of equal degree, the one does not extinguish the other. 2 *Bac. Ab. Tit. Extinguishment.* It must be averred and proved, that a higher security is taken in satisfaction of a lesser; there is no presumption in that case, much less when the securities are equal. 1 *Mason*, 506. Although other points in the answer are unsupported, that does not impair our defence on the grounds I have stated. We pray to be restored to our securities as they stood on the 1st of April, 1818.

*Van Arsdale*, in reply.

The bonds of 1814 were given up by Emans for the King bonds; these were given up, and the Oliver bonds of 1817 taken. On the 1st April, 1818, there were no other securities brought forward, than the King bonds and mortgage of 1816, by Cummins Oliver, and the J. Oliver bonds and mortgage of 1817, by Emans. It is not a question of substitution and extinguishment of one security by the mere taking of another; but of cancellation, and discharge of the lien. They say Emans cancel-

led the bonds of 1814, but not the mortgage: the bonds being cancelled, the lien of the mortgage was gone; there was no lien of 1814 in existence, on the 1st April, 1818. Emans was then of sufficient capacity. Some of the witnesses on this point speak of his capacity at an after period, which is of no importance. The matter of priority was distinctly understood and agreed to at that time. Wortman was the general agent of Emans; it was not necessary he should have a power of attorney. They took the act of the agent, and Emans adopted it, and put the mortgage on record. The defence set up is fraud; the incapacity is brought forward as auxiliary. The fraud alleged in the answer is wholly disproved, and the defendants are obliged to rely on a circumstance not before thought of.

THE CHANCELLOR. The pleadings present two or three points to which the evidence has been directed.

First—It is alleged that the complainant's mortgage was fraudulently dated the 1st of April, when in truth it was executed on the 2d; or that the defendant's mortgage was fraudulently dated the 2d of April, when in truth it was executed on the 1st. The bonds and mortgage of complainant are dated on the 1st: those given to Emans are dated on the 2d. The mortgages are acknowledged of the same days that they respectively bear date. There is no evidence to show that these acknowledgments are falsely dated. It appears by the testimony of John R. Hinchman, the scrivener, that while he was drawing the writings, he was directed by Cummins Oliver, to date his mortgage and bonds one day the oldest. Emans was present at the time, as was also Peter Wortman, one of the defendants. Cummins Oliver spoke loud enough to be heard by all. Wortman was assisting in the business of Emans, his father-in-law, and drew some of the writings. The testimony of Cummins Oliver is very full as to this matter. He says the papers were acknowledged on different days, and that it was talked of over and over again, and well understood that his mortgage should bear date first and have the priority. The defendants' allegation in this behalf is not sustained by proof.

Secondly—It is alleged that the mortgage from Chidester to Oli-

ver was without consideration, and therefore fraudulent as against the defendants.

The mortgage was given from Chidester to Cummins Oliver, to secure the payment of one thousand one hundred and thirty dollars. It appears that this property, in 1814, belonged to Nicholas Emans, who purchased it at sheriff's sale. In 1814, he sold it to Jonathan Oliver, and took a mortgage on it for one thousand and five dollars. Afterwards, on the 21st of May, 1816, Jonathan Oliver sold the property to one Jason King, for three thousand dollars, who gave a mortgage and four bonds for the purchase money. Two of these bonds were passed to Emans, and two of them Oliver passed elsewhere. Jason King soon after conveyed the property back to Jonathan Oliver, to wit, on the 3d May, 1817. On the 27th of May, 1817, Oliver gave a new mortgage to Emans for one thousand and fifty-five dollars and ninety-four cents, and the bonds accompanying the mortgage of 1814 were cancelled.

It appears further, by the testimony of Cummins Oliver, (for there is no other evidence on the subject,) that when Jason King re-conveyed the premises back to Jonathan Oliver, two of the four bonds which he had given to Jonathan Oliver were outstanding, and Cummins Oliver, with one Hart, became security for the delivery of those bonds to King. Jonathan Oliver represented that they had been pledged, and that about twenty dollars would redeem them. One was represented to be in the hands of Jeduthan Condict, and one in the hands of Samuel Halliday, late sheriff of Morris. Cummins paid eight hundred and twenty-four dollars to take up these bonds, and upon this, Halliday assigned the two bonds and the mortgage to Cummins Oliver. Besides this, he paid other debts for Jonathan Oliver, to the amount of two hundred and fifteen dollars, making in all one thousand and thirty-nine dollars. Cummins alleges that he held these bonds and the mortgage until he got the mortgage from Chidester, in 1818. On the 15th of September, 1817, Jonathan Oliver sold the property to Cummins Oliver, and gave him a deed; and on the 1st April, 1818, Cummins Oliver conveyed the property to Japhet B. Chidester, for two thousand seven hundred dollars, or thereabouts.

From this, it would seem, that the property was conveyed by Jonathan Oliver to Cummins Oliver in good faith; he being the

owner of the property, sold to Chidester, and the mortgage given to him by Chidester for the balance of the purchase money, was a mortgage for a valuable consideration. It is not material now to inquire, whether the mortgage and bonds originally given by King and assigned over by Halliday to Cummins Oliver, were existing liens on the property on the 1st of April, 1818; or whether or not the transaction between Oliver and King was valid. It is sufficiently proved, that Cummins Oliver advanced upwards of one thousand dollars for Jonathan Oliver, and in satisfaction of his debts. This was a sufficient consideration for the conveyance from Jonathan to Cummins Oliver, subject to the mortgage of Emans, which was upwards of one thousand dollars. There is no pretence of proof that this sale was made subject to the trust (to pay the debt to Emans) mentioned in the answer. Cummins Oliver swears it was an absolute sale; and in the absence of all evidence on the part of the defendants to the contrary, it must be so considered: and Cummins, being the absolute owner, his conveyance of the property to Chidester, must be taken to be a fair and bona fide transaction. The second ground of the defendants is not supported.

Thirdly—The defendants insist, in the next place, that advantage must have been taken of the imbecility of Emans; that the giving up of his prior lien could only have been induced by some collusion or contrivance; that it amounts to a legal fraud, and therefore the Emans mortgage should be preferred. In regard to the prior lien, the complainant denies the pretension of the defendants, and insists that the King mortgage then in the hands of Cummins Oliver, dated in 1816, was a lien on the property; the mortgage was certainly produced at the time the new mortgages were given, and if it was then operative on the property, it was prior to the mortgage produced there by Emans, because that was given by Oliver in 1817, and the former bonds cancelled. It is contended, however, that the King mortgage was not a subsisting lien on the property in 1818; and therefore that the mortgage of Emans from Jonathan Oliver was the oldest lien. However fraudulent the conveyances between Oliver and Jason King may have been, I doubt whether the defendants can set it up at this time as against the complainant. Emans had notice of this conveyance, and of the King mortgage. He actually took

two of the four bonds accompanying the mortgage, probably as collateral security: he made no complaint of fraud at that time. The conveyance did not disturb the lien of his mortgage. The taking of the two bonds from King, the owner of the property, was, if any thing, a sanction on the part of Emans of the lawfulness of his right. Two of the bonds and the mortgage were assigned over to Cummins Oliver, as we have seen, for a valuable consideration; and although he afterwards purchased of Jonathan Oliver the equity of redemption, I am not prepared to say that he was not warranted in retaining the mortgage as a security for his title. It is not a necessary consequence, when the legal and equitable titles unite in the same person, that the equitable title becomes merged in the legal. A court of chancery will consider the mortgage as subsisting, when the purposes of justice require it. I incline to the opinion that the King mortgage was a lien on the property on the 1st of April, 1818, when the two mortgages now in question were given; but as the view which I take of the case renders it unnecessary to decide that point, I desire to be understood as expressing no definite opinion upon it.

Admitting that, in strictness of law, the King mortgage in the hands of Cummins Oliver was no lien on the property; are the circumstances attending the execution and delivery of these mortgages, of such character as to call for the equitable interference of this court to alter what appears now to be the legal rights of the parties? The power of the court is undoubted, and in all proper cases it should be fearlessly, though cautiously exercised.

There are various species of fraud which are the foundation of equitable relief. They are admirably classified by Lord Hardwicke, in the case of *Chesterfield* v. *Jansen*, 2 *Ves.* 155. Fraud may arise from facts and circumstances of imposition: it may be apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other: it may be inferred from the circumstances and condition of the parties contracting, for it as much against conscience to take advantage of a man's weakness or necessity, as his ignorance; and it may also be collected from the nature and circumstances of the transaction, as being an imposi-

tion on third persons. Will this case come properly under any of these species of fraud? Does the fact that a priority was given to the complainant's mortgage, warrant the inference of fraud and circumvention? It is very evident, that whether in strictness the King mortgage was a lien or not on the property on the 1st of April, 1818, it was so considered by the parties: they acted on that supposition: both parties may have been mistaken, without subjecting themselves to the imputation of fraud. If Emans was mistaken in regard to this matter, and acted under that mistake, without any improper concealment or misrepresentation on the part of Oliver, and when he might have been advised on the subject if he had taken the precaution; can he come now into a court of equity for relief? It does not appear that he was constrained to come into this "new arrangement," as it is called. He had his old mortgage of 1817. The change of the securities was voluntary, so far as we know; and it does not appear that any artifice was made use of, to induce him to take the second mortgage. Under these circumstances, he cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences flowing from those facts. *Shotwell* v. *Murray*, 1 *Johns. C. R.* 516.

Cummins Oliver assigns, as the reason why the first mortgage was given to him and the second one to Emans, that the King mortgage was older than the one Emans then held; and therefore he had a priority. This was doubtless the opinion of Wortman, the friend of Emans. He stated that he thought *they* (Emans and himself) *ought to have* the oldest claim; and he had been at a good deal of trouble and expense in searching records, looking about titles, &c. but it did not turn out so. Emans thought too, that his mortgage should be the oldest; but it appears finally to have been agreed on that the property was enough to satisfy both mortgages, and that it made but little difference which was first. There is no evidence to show what the actual value of the property was at that time. The first mortgage from Oliver to Emans in 1814, was for one thousand five hundred dollars, and it is safe to conclude that the property was worth at least that amount at that time. Real estate afterwards commanded a higher price in the market. In 1818,

when these mortgages were given, it was not far from its maximum; and if property had not greatly depreciated, the present difficulty would probably never have been heard of.

The taking of the second, or junior mortgage, on the part of Emans, may have been injudicious; but I do not feel warranted in saying that the procurement of the first, on the part of Oliver, was fraudulent; more especially as Emans voluntarily relinquished his original lien of 1814, and took the second mortgage of Oliver in 1817, with full notice that the King mortgage of prior date was outstanding and uncancelled. But for that, the probability is, his original priority would never have been affected.

There is considerable evidence as to the incapacity of Emans. Doubtless his faculties were impaired; and if this business had been transacted by him alone, the case would have presented much stronger claims to the consideration of the court. But he had with him a friend and adviser, in whom he had confidence, and who, as it is proved by the testimony on both sides, was his general agent. Joseph Smith, a witness for defendant, says, that Wortman was his agent or assistant from the time of his first illness till his death; that during the years 1817, 1818, and 1819, the old man often went from home to settle accounts, with Peter Wortman to assist him. Under these circumstances, there is, as I conceive, no sufficient warrant for the interference of the court, on the ground of incapacity.

On the whole case, I am of opinion that the complainant is entitled to his decree for a sale, and that the money be appropriated in discharge of the two mortgages in their order of priority on the record.

Let it be referred to a master to take an account, making all just allowances for the use and occupation of the premises, &c.

CITED *in Parker* v. *Child*, 10 *C. E. Gr.* 43.

## JACOB GLOVER v. ELIAS HEDGES.

On a petition and order for rehearing generally, the whole case is open; and the party supposing himself aggrieved, has a right to insist on a reconsideration of any part of it.

On a bill for relief against a verdict and judgment at law, the verdict must be taken as conclusive upon the facts before the jury; there can be no appeal to a court of equity, by way of new trial.

There are cases, nevertheless, in which the court will interefere to prevent fraud or gross injustice: where there has been a fraudulent concealment of facts on the part of the plaintiff, and a judgment obtained against conscience, equity will relieve.

It must appear, however, that the party seeking relief has used all proper diligence to defend himself at law: the possession of new testimony, which with proper care, might have been produced before, is no ground for a new trial at law, much less for an equitable interference with the judgment.

The court ought to be perfectly satisfied of its grounds, before it undertakes to defeat the right which a party has acquired by the verdict of a jury; especially, when such verdict is the result of an investigation of facts. There ought to remain no reasonable doubt.—The new discovered evidence produced in this case, not being sufficiently certain to rest upon, the bill was dismissed, but without costs.

The original bill in this case was filed by Jacob Glover against Elias Hedges, for an injuction, and for relief against a judgment obtained by said Hedges against Glover, in the common pleas of Morris county, for wrongfully cancelling a bond and mortgage given by Samuel Hedges to the said Elias for four hundred dollars, (on which about three hundred was due,) and by him deposited with Glover as collateral security for the payment of a note given by Elias Hedges and Jacob Cory to Glover, for three hundred dollars. The bill charged, that by a certain agreement between Samuel Hedges and the complainant, made with the knowledge and approbation of Elias Hedges, this mortgage was to be cancelled. That Elias, in the purchase from Samuel, of a place called the Frederick farm, had received satisfaction for all his responsibilities for Samuel, and for the debt secured by this mortgage; which fact the plaintiff had concealed until after he obtained the judgment against the complainant.

The defendant, in his answer, denied any agreement on his part

that the bond and mortgage should be cancelled. He alleged, that after the note given by himself and Cory to Glover was discharged, the bond and mortgage was to be redelivered to him, to be held by him as collateral security for the payment by Samuel, of three notes given by Samuel, and himself as his security, to Glover for fifty dollars each, amounting to one hundred and fifty dollars, which notes were given for the balance then due from Samuel to Elias, on the bond and mortgage, and from Elias to Glover on the Cory note—both having been reduced by payments to that sum; that Glover had sued, and obtained a judgment against Samuel and Elias on these notes in the Morris pleas, and issued execution, and Elias had paid the amount to the sheriff: that Samuel was insolvent, and Elias had no prospect of recovering back the money so paid, unless he could collect it on the judgment against Glover for cancelling the mortgage which was to have been his security. He denied that he had received satisfaction for this in the purchase of the Frederick farm, or in any other way.

Witnesses were examined and the cause heard before the late chancellor, in July, 1826, and in October following the complainant's bill was dismissed.*

In February, 1827, the complainant filed a petition for a rehearing, setting forth

1. That he was advised and believed he would, upon a review of the evidence in the case, be able to satisfy the court that the defendant, before the recovery at law of the judgment against complainant, had received satisfaction for what he so recovered.

2. That since the hearing of the cause, he had discovered, that he could prove by several respectable witnesses, that the defendant had admitted to them that he had received such satisfaction in the purchase of the Frederick place; which complainant did not know before.

Upon this petition a rehearing was ordered. In September, 1827, the complainant filed a supplemental bill, charging, that he hoped and expected satisfactorily to prove by the newly discovered testimony of several witnesses, not only that the bond and mortgage from Samuel to Elias Hedges should be cancelled, but that Elias had received payment and satisfaction of the

*See this case, *ante*.

moneys for which he was security for Samuel, in the purchase from him of the Frederick farm; that the judgment was obtained against him, after full satisfaction of the pretended cause of action had been received, by fraud and concealment of the fact that such satisfaction had been received. The supplemental bill was taken pro confesso, in April, 1828, and a further examination of witnesses ordered. Witnesses were accordingly examined, and the cause came on to be reheard upon the original bill, answer and depositions, and petition and order for rehearing, and the supplemental bill and depositions.

*W. Chetwood,* for the complainant.

The bill seeks perpetually to enjoin E. Hedges from proceeding on the judgment against the complainant in the common pleas of Morris, or to obtain a satisfaction of that judgment as being fraudulently obtained. A court of equity may enjoin proceeding on the judgment, or order satisfaction to be entered, upon proper grounds, such as we apprehend exist in the present case. Glover held three promissory notes against Samuel and Elias Hedges, amounting to one hundred and fifty dollars; he prosecuted the notes, and obtained judgment in the Morris pleas. Elias Hedges then prosecuted Glover, in an action on the case, for cancelling the mortgage from Samuel Hedges to Elias, which had been deposited in Glover's hands as collateral security for Elias Hedges and Jacob Cory's note; pretending that, after that was discharged, the mortgage was to be returned to him, and held as collateral security for his responsibility for Samuel Hedges on these notes to Glover. At the trial Glover had no evidence to show that Elias had received from Samuel satisfaction for all responsibilities for him, and especially for this very engagement for which he pretended the mortgage was to be held as his security: and a verdict and judgment was obtained against him. If we can show, that in the arrangement by which the Cory note was extinguished, it was agreed between Samuel Hedges and Glover, with the knowledge and approbation of Elias, that this bond and mortgage was to be cancelled when a settlement between Samuel and Elias took place, and that it did take place; and further, that Elias had received from Samuel, in the purchase of the Frederick farm, satisfaction

for all his responsibilities for Samuel, and of this mortgage debt; and that this fact was concealed by Elias until after the judgment was obtained; then the judgment is without any foundation in justice, is fraudulent, and the complainant is entitled to relief. Of these facts there was strong evidence on the former hearing: the only way in which the defendant attempted to answer it, was by endeavoring to discredit some of the complainant's witnesses, and raise doubts in the mind of the court. Although he succeeded in this, we apprehend a review of the whole case, and consideration of the newly discovered evidence adduced under the supplemental bill, will be sufficient to remove all doubts; and satisfy the court, that the complainant is entitled to relief. [Here the counsel adverted to the evidence, which was voluminous: the purport of that most material, appears in the opinion of the court. The counsel proceeded.] This court has power over a judgment at law, and may relieve against it. 1 *Mad. Ch.* 236–7. It will relieve against a judgment obtained against conscience, by concealment. 1 *Ves. jr.* 135. If the plaintiff knew at the time that the judgment was wrong, the complainant is entitled to relief.

*S. Scudder*, for the defendant.

A court of equity may give relief against a judgment at law on certain grounds, such as concealment on the part of the plaintiff of material facts not within the knowledge of the defendant; for such concealment is fraud. The proof, however, must be beyond all doubt. But when, as in this case, there has been a judgment on a verdict, a rule to show cause argued, and a new trial refused, a court of equity cannot review the judgment, and say that the court of law decided wrong upon the matter before it. The original bill does not present a case sufficient to entitle the complainant to relief. It charges that it was agreed between Samuel Hedges and Glover, that the mortgage from Samuel to Elias Hedges should be cancelled. This was not obligatory upon Elias; he had deposited the mortgage in Glover's hands as collateral security; when that object was answered, he was entitled to a return of the bond and mortgage. But it is added that this part of the arrangement between Samuel and Glover was known to Elias. If it was, that could not affect his rights. The bill does

not place the complainant's claim to relief on the ground of latent fraud or concealment; but says the judgment was without color of right, and insists that the court and jury were clearly wrong. This is not sufficient. The petition for rehearing is also insufficient. This cause has been heard, and a decree passed; after this there cannot be a rehearing upon the merits of the case generally, except on special grounds, such as a deposition or exhibit being lost or mislaid, and omitted to be read on the hearing, so that the cause was not fully before the court. To obtain a rehearing on other grounds, the petition ought to state expressly the point on which the chancellor was mistaken. *Rules Ch.* 57–8–9 and 60; 2 *Mad. Ch.* 370–1. In this case, as to what passed at the former hearing, it merely states that complainant is aggrieved by the decree, and hopes by a review of the evidence to be able to satisfy the chancellor that he is right. As to new matter, the petition states, and the amount of the supplemental bill is, that complainant expects to be able to prove that the bond and mortgage of Samuel to E. Hedges was paid by the purchase of the Frederick farm. But there is no new matter disclosed by the depositions. The evidence of Britton and Griswold, the witnesses relied on, was not newly discovered matter: the defendant was apprized of this before, and might have produced the evidence on the former hearing. It is never cause for a new trial at law, or rehearing in equity, that there is evidence of new matter, which by due diligence might have been produced before. Another objection to Griswold's evidence is, that it is giving in evidence the declaration of Samuel Hedges, who gave the bond and mortgage in question, and was directly interested in saying that Elias had no interest in it. Nor can this evidence now be received to impeach the credit of Samuel Hedges, as a witness formerly examined. A court of law will never give a party a new trial to enable him to discredit a witness. 3 *John. R.* 253; 4 *John. R.* 425; 5 *John. R.* 248. In 14 *John. R.* 186, it was admitted, under very peculiar circumstances. The rule in equity is laid down in 8 *Ves. jn.* 324. After publication passed, the party may have liberty to prove the general character of a witness, but not to contradict a particular fact. But after final decree, it is too late to do either. This objection applies to all the other witnesses examined under the supplemental bill, except

Britton. The testimony of Britton is too vague and uncertain to be relied on. His impressions, derived from conversations with Samuel *or* Elias Hedges, *or* one of them, are very indistinct. Suppose it was from Elias that he understood that Elias had purchased the Frederick farm to save himself against responsibilities entered into for Samuel: that did not authorize Glover, if the responsibilities were satisfied, to destroy the bond and mortgage, which was the property of Elias. It was Glover's duty to return them to him, after the end for which they were deposited in his hands was answered.

*Chetwood*, in reply.

We do not pretend that the court can grant a new trial, or reverse the judgment at law; but it can review the former decree in this court, and rehear the case on the merits generally, without new matter. It was done in this court in the case of *Williamson* and *Crane*. The rule is laid down correctly in *Coop. Eq. P.* 93. The sufficiency of the petition, or propriety of the order for rehearing, cannot now be questioned. By the order the whole case is open; and if the complainant, upon the original case, or under the supplemental bill, is entitled to relief, the court will grant it.

The Chancellor. The object of the bill in this case, is to obtain relief, either by perpetual injunction, or otherwise, against a judgment obtained in the common pleas of Morris county, by Elias Hedges, the defendant in this suit, against Jacob Glover, the complainant; on the ground that the verdict and judgment were obtained in the court of common pleas, by a fraudulent concealment of facts, and is therefore unconscientious. The complainant alleges, that he was unable to make the necessary proof on the trial at law: but has since discovered evidence to show satisfactorily, that the judgment is entirely without foundation, and ought not in justice or equity to be sustained or enforced. The gravamen of the bill is, that the defendant obtained a judgment in the pleas, against the complainant, for two hundred and twenty-three dollars, for improperly cancelling a certain bond and mortgage, theretofore given by one

Samuel Hedges to Elias Hedges, which was deposited by Elias Hedges in the hands of Jacob Glover, as a collateral security, and which has actually been paid, by Samuel Hedges to Elias Hedges, and therefore properly cancelled by Glover.

On the other hand, the defendant, Hedges, insists, that he has an interest in the mortgage, and by the agreement of his brother Samuel, and with the knowledge of the complainant, he was justly entitled to it, as a collateral security, for certain responsibilities entered into for Samuel: that he has paid money for Samuel to the amount of the mortgage, and must lose it, unless he can be permitted to collect and receive the money on the judgment recovered against Glover, for the improper cancellation.

A jury of the country, upon an investigation of the facts, have declared, that the bond and mortgage were wrongfully cancelled, and they have assessed the amount of the plaintiff's damages. The verdict must be taken as conclusive, upon the facts before the jury. There can be no appeal to this court by way of new trial. There are cases, nevertheless, in which this court will interfere, to prevent fraud or gross injustice. Where there has been a fraudulent concealment of facts, on the part of the plaintiff, and the judgment obtained against conscience, equity will relieve. *Stander* v. *Edwards*, 1 *Ves. jr.* 113; 1 *Mad. Ch.*. 236–7. In must appear, however, that the party seeking relief, has used all proper diligence to defend himself at law. The possession of new testimony, which with proper care might have been procured before, is no ground for a new trial at law, much less can it form the ground for an equitable interference with the judgment.

Much testimony was taken by the parties: after the evidence was closed, the cause came on to be heard: and in 1827 it was decreed that the bill should be dismissed; the court being of opinion, that the complainant had not made out his case. A petition for a rehearing was filed, in which it was stated that new and material evidence has been discovered, by which the complainant would show conclusively, that the plaintiff below had received satisfaction for the money recovered of the defendant. The petition, signed by two counsel, was granted as of course. A supplemental bill was then filed, and under this a new volume

of evidence has been taken, much of which consists of an attack upon, and defence of, the witnesses before examined: neither a profitable or commendable mode of proceeding at this stage of the cause.

The cause has been heard a second time. It was objected by the defendant, that the cause could not be reheard on the merits, but that the complainant must be confined to his new matter. This is not so. On an order for rehearing generally, the whole cause is open, and the party supposing himself aggrieved, has a right to insist on a reconsideration of any part of it. I have accordingly reviewed the whole of the evidence.

Two questions arise.

1. Was the former decree right?

2. Is the additional and newly discovered evidence, sufficient to warrant an alteration?

As to the first, I have no difficulty in saying, I am satisfied with the decree formerly made. The case as presented was certainly not a clear one; and I think this court should be perfectly satisfied of its ground, before it undertakes to defeat the right, which a party has acquired by the verdict of a jury; especially when such verdict is the result of an investigation of facts, which it is so peculiarly the province of a jury to pass upon, and for the ascertainment of which that tribunal is so admirably adapted.

2. Is the additional evidence such as to warrant an alteration of the decree?

The testimony of Chauncey Griswold is relied on, as furnishing evidence sufficient to show, that the recovery in the Pleas was wrong and unconscientious. It proves the confession of Samuel Hedges, that he and his brother Elias had settled, and that the old mortgage was paid. The witness says, that this was known to Glover before the trial at law, but he was told the evidence could not be received then. That was certainly correct: Samuel Hedges was not sworn as a witness in that case, and his allegations could not be received against his brother; but this witness, Chauncey Griswold, was sworn and examined in this cause, before the first hearing, and immediately after Samuel Hedges. Why was not this evidence given at that time? Griswold says, he was not asked as to that matter. If

this be so, and it appears to be, from the examination itself, why did not the defendant, Glover, cause him to be examined on that subject? The fact was known to Glover, why was it withheld?

I cannot consider this as newly discovered evidence. It is not within the petition for rehearing, or the supplemental bill. No reason was assigned why it was kept back; and to receive it at this time, and under these circumstances, would be a precedent of dangerous tendency.

The new evidence relied on by the complainant, is that of Abraham Britton. He testifies that he cannot say distinctly what he has heard from Elias and Samuel Hedges, about the purchase of the Frederick place. His impression, derived from conversations with one or both of them, is, that Elias purchased the place to secure himself from responsibilities entered into by him for Samuel. This is too indefinite to be of any weight. He speaks merely of an impression derived from conversations with one or both of them. If derived from one only, and that one Elias Hedges, it is not competent evidence; if from Samuel Hedges, it is not sufficiently certain to rest upon.

From the best view I have been enabled to take of this case, I think it is not made out satisfactorily, even with the help of the additional evidence. There ought to remain no reasonable doubt.

Let the bill be dismissed, without costs.

CITED *in Power's Ex.* v. *Butler's Ad.*, 3 *Gr. Ch.* 470; *Tompkins* v. *Tompkins*, 3 *Stockt.* 514; *Davis* v. *Headley*, 7 *C. E. Gr.* 123.

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## CLARK & SMITH v. SMITH AND OTHERS.

W. H., by consent of the mortgagees, and while a bill for foreclosure and sale of the premises was depending, took possession of a cotton mill and premises, (supposed to be worth not more than the amount of the complainant's mortgage,) in expectation of becoming the purchaser, and before a decree for sale of the premises was obtained. Considering it necessary to enable him to use the property to advantage, to make improvements and repairs, and in order to protect himself in so doing, he obtained from J. T. a defendant in the suit and holder of a subsequent mortgage, an instrument of writing, in which after reciting that J. T. held a mortgage on the premises in question for about one thousand five hundred and sixty-one dollars; that there were prior incumbrances on the property; and as the premises were not considered

worth more than the prior incumbrances, and therefore furnished no security for the amount due to J. T.; and as the said W. H. wished to take possession of, to improve, and extinguish all incumbrances on, the property; therefore, to enable him to extinguish the outstanding incumbrances, he, J. T. for the consideration of one hundred dollars, "released to the said W. H. all the right, title, and interest, which he, the said J. T. had, in and to the said cotton mills, machinery, and premises, by virtue of said mortgage." By this instrument the mortgage, which was the security, was separated from the debt, which was the principal. The only operation of the instrument was, to release or give up the mortgage, and exonerate the property from its lien: it did not extinguish or transfer the debt, or impair the claim of J. T. for the same, against the other property or person of the mortgagor.

W. H. also obtained from subsequent judgment creditors, an instrument, wherein, after reciting that as the prior incumbrances exceeded in amount the value of the property, which formed therefore no security for the judgment, they, the plaintiffs, for the sum of thirty-three dollars seventy-five cents, and for the purpose of enabling W. H. to extinguish the outstanding incumbrances, "released to the said W. H. all the right, title, and interest, which they had in said cotton mills, machinery, and premises, by virtue of said judgment." Notwithstanding this, the judgment remains, and remains the property of the plaintiffs; but this estate is to be no longer subject to its lien.

The premises in question having been thus exonerated from the operation of these liens, and having afterwards been sold by the sheriff for an amount exceeding the demands of the complainants; W. H., by virtue of these instruments, is not entitled to the surplus money, but it must go to the assignee of the mortgagor, (he having been discharged under the insolvent act,) for the benefit of his creditors.

Where one comes into possession under mortgage creditors, he may be considered as a mortgagee in possession; yet when he comes in purely as a volunteer, whether he ought to be placed in a situation quite so favorable, *Quere.*

Where a mortgagee in possession, is necessarily put to expenses, in defending or securing the title, he is entitled to an allowance for the expenditure: as where he has been put to expense in foreclosing his mortgage, or has advanced money for fines on the renewal of leases under which the premises were held, or has expended money in defending the title of the mortgagor to the estate, when his title has been impeached, it may be added to the debt of the mortgagee: and taxes, if paid by the mortgagee, are a proper charge against the estate.

But a mortgagee cannot charge for trouble and expense in receiving the rents and profits, although there may be a private agreement for such allowance between him and the mortgagor, nor for the expense of insurance, which is considered as the act of the mortgagee, for his own benefit.

So, where a mortgagee in possession, undertakes, without the consent and approbation of the mortgagor, to make improvements on the property, though they may be of a beneficial and permanent character, he does it at his pe-

ril, and has no right to look for an allowance at the hands of the mortgagor. If the mortgagor does not choose to have the improvements, the mortgagee has no right to impose them upon him, and thereby, perhaps, deprive him of the power of redeeming.

The ordinary rule is, that money laid out in improvements, does not create a lien: there is no hardship in the rule. A mortgagee is no more bound to improve the estate, than the mortgagor. If the mortgagor, after giving the mortgage, makes improvements on the premises, the whole of them shall go, if it be necessary, to satisfy the mortgage; and so, if improvements are made by the mortgagee, they are voluntarily made, and he cannot afterwards turn round and claim allowance for them. They will enure for the benefit of the estate, and if he should suffer a loss, the maxim will well apply; *volenti non fit injuria.*

It is well settled, that a mortgagee in possession is not bound to expend money on the mortgaged premises, further than to keep them in "necessary repair:" this language has been construed strictly, and such allowance put on the ground of "absolute necessity for the protection of the estate;" for such expenditure, when incurred, he will receive allowance.

If in this case the mill could have been used with the machinery as it was when W. H. voluntarily took possession of it; if the repairs made were for the purpose of increasing its speed, or enabling it to do a greater amount of work than it had formerly done, when its machinery was in order, so as to enhance the benefit of the possession; then no allowance is to be made for the repairs. If they were really indispensable to keep the mill in operation, then they ought to be allowed.

There is a distinction between necessary repairs and highly beneficial improvements: in this case it was referred to a master to take an account of such repairs, if any, and of the proper allowance to be made therefor.

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A bill was filed by the complainants for a foreclosure and sale of certain mortgaged premises in Paterson, in the county of Essex, consisting of a cotton mill and machinery, then in the occupation of Nicholas Smith. There were a number of incumbrances on the property, and all persons interested were made parties to the bill. In 1826, an execution issued for the sale of the premises, to raise the sum of eight thousand nine hundred and nineteen dollars and ten cents; being the amount decreed to be due to the complainants, to Samuel Downer and John Crumby, and to the Paterson bank; being all the claims which had been presented to the master who took the account. Besides these claims, there was a judgment due the Paterson bank of about dollars, which by accident was not included in the master's report; and there was also a judgment in favor of Benjamin Deforest and Al-

fred Deforest, for about four hundred dollars, and a mortgage to Jonah Tilley of about one thousand six hundred dollars. The property brought at the sheriff's sale the sum of eleven thousand seven hundred and forty dollars; which, after satisfying the demands of the execution, left a balance in the hands of the sheriff of two thousand seven hundred and eleven dollars and seventy-once cents, subject to the order of the court.

In 1827, Warren Haight filed his petition in this court, praying that this surplus money might be paid over to him. He stated in his petition, that pending the above mentioned suit, he entered and took possession of the mill and premises, with the consent of the persons entitled to the equity of redemption, or some of them, and under an expectation of becoming the purchaser; that the premises were at that time in a very dilapidated state, and not considered to be worth the amount of incumbrances; that finding extensive improvements necessary to enable him to use the property to advantage, he did, in order to protect himself as far as possible, obtain from Jonah Tilley, one of the defendants in the suit, an assignment of his mortgage on the premises, and from Benjamin and Alfred Deforest, two of the defendants, an assignment of their judgment against Nicholas Smith; that having procured an assignment of said incumbrances, he proceeded to make repairs and improvements on the said mortgaged premises, to the amount of three thousand two hundred and seventy-seven dollars, and also put new machinery in the mill to the value of two thousand six hundred and eighty-seven dollars; that at the sheriff's sale he became the purchaser of the property for eleven thousand seven hundred and forty dollars, which has been satisfied to the sheriff, and he has received a deed for the property. He further sets forth, that he has obtained an assignment of the judgment of the Paterson bank above specified, and that there is due on the same the sum of seven hundred and forty-nine dollars, or thereabouts; that there is due on the mortgage assigned to him by Tilley, one thousand six hundred and fifty-two dollars, and on the judgments assigned to him by the Deforests, four hundred and twenty-three dollars or thereabouts, making altogether an amount exceeding the surplus money raised on the execution; that he is the bona fide owner of the property, and that the property would not have

brought enough at the sheriff's sale to satisfy the execution, but for the extensive and valuable improvements and repairs made on it by the petitioner. He prays therefore, that an account may be taken of the amount of said incumbrances, and that the surplus money, or so much as may be necessary, be directed to be paid him in satisfaction of the same.

The petition was referred to a master, who proceeded to take evidence and examine the facts charged in it. After investigation, the master reported that the petitioner had no claim to any part of said surplus, by reason of the alleged assignment of the Tilley mortgage; that the assignment or release from Tilley to Haight, did not operate to pass over the debt to Haight, but only to extinguish the mortgage lien on the premises; and so, in like manner, that the assignment or release from the Deforests to Haight, did not pass to him their interest in the judgment, but was intended to extinguish the judgment lien on the property about to be purchased by Haight; and in regard to the claim of the petitioner under the judgment in favor of the Paterson bank, the master reported that it did not appear that the judgment was ever assigned to Warren Haight, but that the amount due on it was rightfully owing to the said Paterson bank, which was entitled to receive it out of the surplus; and that the balance of the said surplus should be paid to Uriah Garrabrants, the assignee of Smith the mortgagor, (who had become insolvent and taken the benefit of the insolvent laws,) to be by him appropriated for the benefit of Smith's creditors. Exceptions were taken to the report of the master generally, and the whole matter was brought before the court for revision.

*P. Dickerson*, for the petitioner.

The bill was filed in October, 1824. N. Smith, the mortgagor, was discharged under the insolvent act, in February, 1825. After that, no person took charge of the property. Dickey, the tenant, gave up possession of the mill; Garrabrants, Smith's assignee, delivered over the keys to the agent of the Paterson bank. In June, 1825, they rented to Ruton & Benson, who soon after gave up the possession. The bank, holding the first mortgage and a subsequent judgment, were willing to make a sacrifice. They

offered to sell the property, but could not. It was then thought not worth nine thousand dollars. Afterwards, Haight came forward, and on the 4th of March, 1826, contracted with the bank for their claims on the property. It was then in such a state that he could not use it to advantage without improvements and repairs. To secure himself in making the improvements and repairs that were necessary, on the 6th March, 1826, he entered into these contracts with Tilley and the Deforests. Tilley, for one hundred dollars, agreed that Haight might have the control of his mortgage, and extinguish it when he thought proper. (He consented also that the bond might be used for the purpose of obtaining a decree. We had it in our hands, but it got back into the hands of Tilley, and therefore the master would make no report on this mortgage.) The Deforests, for thirty-three dollars and seventy-five cents, made a similar agreement as to their judgment. These transactions were perfectly fair, and the considerations sufficient, as the claims were given up as lost. Haight sought to obtain the control of these incumbrances, that he might thereby protect himself in making the necessary repairs and improvements; and not for the purpose of extinguishing them for the benefit of other persons. He took possession on the 26th March, 1826; put in new machinery to the amount of one thousand nine hundred and eighty-one dollars; expended one thousand four hundred dollars in repairs and improvements on the property, and carried on the mill until the sale. In July, 1826, there was a decretal order made in the cause, referring it to a master to take an account as to mortgages: judgments by accident were omitted in the order, and therefore not noticed in the report. This was considered unimportant at the time, as it was not supposed that the amount of the sale would reach them. A final decree was obtained in October, 1826, and an execution issued, upon which there was due on the 6th March, 1827, nine thousand and twenty-eight dollars and twenty-nine cents. The property was then sold by the sheriff to Haight, for eleven thousand seven hundred and forty dollars. From the evidence taken under the petition, it is manifest, that without the improvements and repairs made by Haight, the property would not have sold for more than sufficient to satisfy the decree. As it is, it has produced a surplus of two thousand seven hundred and eleven

dollars and seventy-one cents, which is claimed by the petitioner. But the master's report gives it to Garrabrants, the assignee of Smith, for the benefit of his creditors. The master, we apprehend, has mistaken the nature of these contracts between Haight and Tilley, and the Deforests. He supposes them to be releases, and that they operated to extinguish the claims. This is not the effect of a release to a purchaser: it passes an interest when it is necessary to effectuate the intent. 2 *Mason R.* 531. These contracts were not intended to extinguish the liens, but to give Haight the control of them for his benefit, and enable him to extinguish them when he thought proper. Equity will regard the intent of a contract and carry it into effect. The intent in this instance cannot be mistaken, and to carry it into effect, an interest in these liens must necessarily pass to Haight. He claims the surplus money on two grounds. 1. Having come into possession under the mortgagees, and made improvements and repairs to a large amount, he claims it as mortgagee, on the ground that a mortgagee in possession, is entitled to an allowance for all permanent and necessary improvements and repairs. 1 *Vern. R.* 316; 3 *Atk. R.* 518; *Pow. on M.* 88–9; *Finch R.* 38; 4 *Ves. jr.* 266; 3 *Pow. M.* 956 *n.* (*q.*) 957. 2. He claims it as having the equitable right to the incumbrances of Tilley and the Deforests. These are next in order to the Paterson bank judgment; they are outstanding incumbrances, and Haight is entitled to all the benefit to be derived from them. Tilley and the Deforests, after having agreed to give the whole benefit of these liens to Haight, cannot now turn round and claim the money under them; and it would be still more inequitable and unjust, that they should be considered as extinguished, and the extinguishment should enure for the benefit of Smith and his creditors, and be of no service to Haight. It would defeat the obvious intent of the parties, and instead of protecting Haight, would expose him to the very difficulty he sought by these contracts to avoid.

*W. Pennington*, contra.

Haight claims on two grounds: under the agreement with Tilley and the Deforests, and for improvements.

1. As to the agreements. The contract with Tilley cannot operate as an assignment of the mortgage; the debt is the principal, the mortgage is an incident. Tilley had a right to destroy the incident and extinguish the mortgage if he chose. 4 *Kent*, *C.* 186; 11 *John. R.* 584. But he could not, by way of assignment, separate the mortgage from the debt; the debt cannot be in one person, and the interest in the mortgage in another. 4 *John. R.* 41; 5 *John. C. R.* 570. From these cases, the fair conclusion is, that mortgages are mere securities for the debt; they only pass an interest in the land as ancillary to the debt. Unless therefore the debt, or the interest in it, was assigned to Haight, the assignment of the mortgage was void. The proper construction to be given to the agreement with Tilley is, that it is an extinguishment of the mortgage lien on the premises. 19 *John. R.* 326. This is in accordance with what we consider the spirit of the contract. The agreement recites a wish to extinguish the incumbrances. On the other side, it is said, that it was not intended to extinguish the mortgage, but to enable Haight to do it when he thought proper; but if so, that does not authorise him to take the debt and consider it as his own; the agreement does not transfer the mortgage, but releases all right under it. It can amount to nothing more or less than an extinguishment. The agreement with the Deforests is of the same import, made on the same day, and with the same view. It releases to Haight all right and title to the mill, under the judgment. It does not release the debt, but only the lien under the judgment. Tilley on his bond, and the Deforests under their judgment, yet have subsisting demands against Smith, which he may at any time be called on to pay.

2. As to the claim for improvements. At first view, there would appear to be some equity in this, as the improvements were put on the property by Haight; but such a doctrine is inadmissible. According to this a mortgagee might make great improvements, then at the sale give notice that he claims for improvements, embarrass the sale, and when the property was sold for a depressed price, come in and claim the surplus. This is a dangerous doctrine for mortgages; the cases are the other way. 1 *John. C. R.* 385. The most favored situation in which

Haight can be placed, is that of a mortgagee. Standing in that character, (for the sake of argument,) he is not entitled to the surplus money. I do not deny that a mortgagee in possession may repair a roof for upholding the premises, and be allowed for it; it may be necessary to prevent the destruction of the property; but the court have been careful to limit the principle to necessary repairs; else a mortgagee might raise the value of the premises, and the amount of his lien, so much, that the mortgagor could not redeem; and the greater the value, the greater the danger, as upon a sale there would be fewer bidders. But what was the situation of Haight, with respect to this property? Smith, the owner of the equity of redemption, was prostrate; the Paterson bank had a large amount of liens on the mill; a bill for foreclosure was filed in 1824; the suit was depending nearly two years, during which time Haight had nothing to do with it. After all this, he comes in, contracts with the incumbrancers, and takes possession of the property, in March, 1826. There was a decree for sale in October, 1826: if he had only waited a few months, there would have been a sale of course. He is, therefore, a mere volunteer, and does not stand in the light of a tenant by mortgage, who is driven to make repairs for the support of the property.

What were the repairs he put on the premises? He evidently intended to become the owner of the property, and he made improvements to suit his own views. To admit the principle, that for these improvements he is entitled to allowance in relation to these mill establishments, would be ruinous: in them many changes are made, not to support them, but to improve their operation, and render them more productive; and all these may, by some persons, be considered necessary, as they are by witnesses in this case. Another consideration is, the bank took possession of this property, rented it one year, and received the rent; Haight occupied it another year before the sale; yet we have no account of rents and profits. If these improvements are to be paid for, we say they ought to be paid for out of the rents. Haight also put in new machinery; notice was given at the sale that this did not go with the mill; the sale was embarrassed by it, or the property might have sold for more. Haight bought,

it, and then comes in and asks for the surplus money. We apprehend he is not entitled to it. We agree, that Tilley and Deforests are not, by virtue of any liens they have on this property: the money belongs to the assignee of Smith, for the benefit of his creditors.

*T. Frelinghuysen*, on the same side.

After the bill was filed, and Smith was prostrate, the bank set about to save themselves; the suit was delayed, and they rented the property. After the tenants gave up, Haight came forward; it was a speculation between the bank and Haight. Their object was to secure their claims; his to become the owner of the property. Smith, the owner of the property, had nothing to do with it. Haight agreed with the bank to remove the incumbrances, and they agreed to sell their whole interest to him. This gave him the control, and prevented competition. After making the arrangements with Tilley and the Deforests, he took possession of the property; he treats the property as his own; re-organizes it, and introduces new machinery, to suit his own views. At length the property is sold, and, unexpectedly, it brings more than the incumbrances included in the decree! Haight then turns round and claims the surplus, in the character of a mortgagee, because he says he has made improvements. He does not stand in the light of a mortgagee; he is a mere volunteer, and a volunteer while a suit was depending, and after the court had taken cognizance of the whole matter. He claims the new machinery; that was not sold; he gave notice that he claimed it, which embarrassed the sale of the property, and this must always be the case, where such a course of proceeding is allowed. Supposing him a mortgagee, his claim for improvements is inadmissible. The allowance of such claims would lead to the ruin of mortgagors; it would enable a second mortgagee always to defeat the third, by adding to the amount of his prior lien, a charge for improvements voluntarily made. Such a principle has never found footing in New-Jersey. The authority from Powel, is the dictum of a Mr. Coventry, of Lincoln's Inn; it is not supported by the cases. The true doctrine in that book, and in the chancery of New-York, is, that when the repairs are necessary for the pro-

tection of the estate, they may be allowed. The mortgagor, it seems, has his *veto*. In 1 *Ball & B.* 385, Lcrd Manners says, the mortgagor should at once be deprived of the necessity. Haight is not entitled to the money on this ground; nor do the agreements with Tilley and the Deforests avail him any thing; they are under seal; they speak for themselves, and clearly show the intent of the parties. The object was to extinguish the outstanding incumbrances; the parties only released to Haight such right to the mill, as they had under the mortgage and judgment, but did not transfer the debts. Haight acted on the belief that the property would not bring more than nine thousand dollars, and in that view he dealt with Tilley and Deforests. When the final arrangement was made with the bank, they stipulated to assign and transfer to Haight the bonds and mortgages they held against Smith. Haight's difficulty is, that he treated the property as his own, when he had no right to do so, and could have been under no mistake about it. If he has expended his own money in improving the property of another, without authority for so doing, and at a public sale has been compelled to pay for these improvements, and suffered by it, he has no reason to complain; but from the circumstances of this case, it does not follow that he has suffered any loss. He occupied the property a year before the sale, without accounting to any one, so far as appears, and the rents and profits ought to at least to be an equivalent for the improvements.

*I. H. Williamson*, for the petitioner, in reply.

Any delay in the suit is not to be imputed to Haight; he was not a party. The property was abandoned by Smith and his assignee; his tenant also abandoned it, and the keys were delivered up to the agent of the bank. It was after this that Haight entered into the property, not for the purpose of speculation, or with any fraudulent intent, but with correct and proper views. The property was so circumstanced, that a sale was necessary, and he expected to become the purchaser; it was in a dilapidated state, unfit for use; he adopted the plan of taking up or extinguishing the liens; he agreed with the bank for the pay-

ment of their whole debt, including their judgment, and made arrangements for securing the control of Tilley's mortgage, and the judgment of Deforests. After this, he repaired and improved the property. In consequence of his taking possession, and making these improvements, the property has sold for a much greater sum than it otherwise would. He now claims for the amount of Tilley's mortgage, and Deforests' judgment and for repairs.

1. Tilley's mortgage has not been paid; if not extinguished, it remains a lien on the property. A court of equity is never embarrassed by technical forms; it looks at the intention of the parties. Tilley has parted with his mortgage; if there was no intention to extinguish it for the benefit of Smith, it remains for the benefit of Haight. It is not merged in the legal estate; the law will not endure a legal and equitable estate in the same person; but equity will preserve these two interests distinct, to effectuate justice, and the intention of the parties. 18 *Ves. jr.* 69; 6 *John. C. R.* 417. What then was the intent of the contract between Tilley and Haight? From the agreement it appears, that Haight desired to secure himself; Tilley's object was the same. It could not have been the object of Haight to extinguish the mortgage for the benefit of Smith, or his general creditors. The instrument may be corrected so as to carry into effect the intention of both parties, and secure Haight. Tilley does not object to it; no one objects but Smith; the transaction was fair as it respected him; it did not injure him in any way; he is safe, on our doctrine. If Haight raises the money on the mortgage, a court of equity will protect Smith against the bond; if it is not paid on the mortgage, then he is liable on the bond; he has no right to complain. The master supposes that the agreement between Tilley and Haight, operated as an extinguishment of the mortgage; we think not. In equity, a release will have the operation intended by the parties. 2 *Mason R.* 531. The release should have been considered as continuing and preserving the mortgage, for the benefit of Haight. No actual transfer of a bond and mortgage is necessary in equity to vest the right. We admit that at this day, a mortgage cannot be assigned, without the debt, so as to authorize the assignee to bring ejectment; but does it operate as an extinguishment? We think not; to give it that effect, in this instance, would violate

the intention of both parties. The judgment of Deforests stands on the same footing.

2. As to the claim for repairs, the quantum is not now the subject of consideration; that is for the master. It is enough for us to show, that Haight made necessary repairs; it is not denied that he made improvements and repairs. The evidence proves, that he expended a large amount in repairs, much of it for the preservation of the property, by which its value was greatly enhanced. Without this, there would have been no surplus to contend about. Smith is not injured; he stood by, and made no objection to the improvements; to object to it now, is contrary to all equity and conscience. They refuse to pay even the ground rent. Ground rent and taxes, are always paid by the person in possession, and allowed. A mortgagee in possession, is always allowed for necessary repairs; the decision in *John. R.* is correct. There the claim was for clearing wild lands, and in that case the chancellor allowed for necessary reparation. They say Haight was a volunteer; if so, he did not injure Smith; he took possession when no one else would, and made it bring more than it otherwise would have done. We make no claim for the new machinery put in; notice was given at the sale that this would be taken out. This was not done to embarrass the sale, but to remove difficulty. Every one knew what he was going to buy. But it is said Smith has not had the benefit of the rents; and the repairs ought to be satisfied from them. This question cannot now arise. If the bank were in possession, the rents and profits should have been brought in before the master. Haight cannot be charged with rents, before he came into possession. We are entitled to an account, for necessary repairs, and think the surplus money cannot, on any principle, be awarded to Garrabrants; it belongs to Tilley, or Deforests, or to Haight.

THE CHANCELLOR. The first matter for inquiry is, whether the petitioner can make lawful claim to any part of this surplus money, by virtue of the releases, or assignments, (as they have been called,) from Tilley and Deforests.

On this part of the case, I am perfectly satisfied with the master's report.

If Haight can claim under these assignments, it must be on

the ground, that they vested in him all the rights and interest of these judgment and mortgage creditors; that the debts themselves, or the right to receive them, were transferred to him. Is this so? Let us look at the instrument, which has been called the assignment of the Tilley mortgage. It states that Tilley had a mortgage on the mills and property in question, given by Smith, for about one thousand five hundred and sixty-one dollars; that that were prior incumbrances on the property, to the amount of about nine thousand one hundred and forty dollars, which had been purchased by Haight; that as the premises were not considered worth any more than those prior incumbrances, and therefore furnished no security to Tilley, for the amount so due to him as aforesaid; and as the said W. Haight wished to take possession of, and improve the said property, and to extinguish all incumbrances upon the same; therefore, to enable the said W. Haight to extinguish the outstanding incumbrances, he released, (for the sum of one hundred dollars,) "all the right, title and interest, which he, the said Jonah Tilley had, in and to the said cotton mill, machinery and premises, by virtue of said mortgage."

I see nothing in this instrument, that looks like a transfer of the debt to Haight. Tilley released his mortgage interest, and nothing more; it was to enable Haight to extinguish the encumbrance on the property he was about to own; it was considered that the property, with the load of incumbrances on it prior to the Tilley mortgage, furnished no kind of security to Tilley for his debt; and therefore, he gave it up for the sum of hundred dollars, as mentioned in the instrument; the debt, then, which was the principal, remained in Tilley, and the mortgage, which was the security for the debt, was given up to Haight for his benefit.

What rights then, had Haight, under the mortgage thus released to him? Could he hold it on the property; and if the property brought at sheriff's sale more than enough to satisfy the prior incumbrances, could he take the surplus and appropriate it to the mortgage, and thereby extinguish so much of the debt itself in the hands of Tilley? Surely not. Tilley never parted with his debt; the giving up of the mortgage did not operate to extinguish the debt, or to impair the claim against the other property of Smith, or against his person; he had no other right, under the

assignment, as I conceive, than the right of exonerating the property from the operation of the mortgage; the mortgage was separated from the debt, and vested no interest whatever in Haight. Chancellor Kent, in his commentaries, says, "The assignment of the interest of the mortgagee in the land, without the assignment of the debt, is considered to be without meaning or use. This is the language of the courts of law, as well as of the courts of equity, and the common sense of the parties. The spirit of the mortgage contract, and the reason and policy of the thing, are with the doctrine." 4 *Kent*, 186. Could Haight have maintained an action of ejectment, in a court of common law, on this mortgage, without the bond? Could he, without it, have obtained a foreclosure and sale in this court? Could he have transferred the mortgage, in any way, so as to create an interest in the purchaser? If he could, he might, by some of these means, have satisfied the debt, and cut off the holder of the bond. This cannot be; nor was such the intention of the parties. The object of both, as manifested by the instrument, was to exonerate the property from the lien of the mortgage; and this was effectually done, or the power to do it was effectually given.

The claim under the judgment, in favor of the Deforests, stands upon the same footing. After reciting that the prior incumbrances on the property exceeded in amount the value of the property, and formed, therefore, no security for their judgment, they, for the sum of thirty-three dollars and seventy-five cents, and for the purpose of enabling Haight to extinguish the outstanding incumbrances, "release to the said Warren Haight, all the right, title and interest, which they have in said cotton mills, machinery and premises, by virtue of said judgment." The judgment remains, and it remains the property of the Deforests: but this estate is to be no longer subject to its lien. The agreement was not that so much of the property bound by the judgment, should pass to Haight, and that the money raised by the sale, after satisfying prior incumbrances, should go to Haight, but that the property should no longer be subject to the lien of the judgment.

I am clearly of opinion, therefore, that the petitioner has no just or equitable claim to any part of this surplus money, either in virtue of the mortgage of Tilley, or the judgment of the Deforests.

It is asked, to whom is the surplus money to go? If not to Haight, then certainly not to Tilley, or the Deforests; their right under the mortgage and judgment are gone; they have given them up, and agreed to look elsewhere for their money. It follows, as a matter of course, that it must be paid to the assignee of Smith, the original debtor; no other person can claim it.

It is said, however, that these assignments were made for the benefit of Haight, and that by this construction, the express intention of the parties will be defeated. If this should be the case, will it result from the construction now given, or from the situation in which Mr. Haight stood at the time, and the course he pursued in that situation? He was a stranger to the original transactions; he was let in by persons claiming rights, but not by the real owner; he proceeded to buy up, and extinguish the incumbrances; treated the property in every respect as his own; repaired, altered and improved it; and all the while appeared to forget that the person holding the equity of redemption, stood behind him. Mr. Smith, and his rights, appear to have been lost sight of entirely; he had, at that time, taken the benefit of the insolvent laws; all his interest, of what kind soever, had been assigned over, and it is not to be wondered at that his right of redemption should have been considered of too little value to be attended to, when we look at the amount of incumbrances; and when we know, too, that in the state of New-Jersey, assignees of insolvent debtors too often pay little or no attention to the property assigned to them or the rights of those interested.

If these releases do not operate to the benefit of Mr. Haight, it cannot properly be imputed to the construction now put upon them; he ought to have secured the equity of redemption, and then he would have been perfectly safe.

I proceed, now, to consider the claim set up by the petitioner, to allowance for necessary repairs and improvements, after the property came into his possession. It appears by the evidence taken before the master, that Haight went to a considerable expense in improving and repairing the property, and that he put new machinery in the mill, to enable him to operate with greater benefit. The new machinery could not belong to Smith; it was expressly excepted at the sale, and cannot enter into this controversy. The single inquiry therefore is, whether Haight can be allowed for

any repairs or improvements, made while he held the property, and before the sale.

He came into possession under the Paterson bank, and others, being mortgage creditors; he may be considered, therefore, as a mortgagee in possession; and yet, when it is seen that he came in purely as a volunteer, I am not sure that he ought to be placed in a situation quite so favorable. Whether a mortgagee in possession shall be allowed, in accounting with the mortgagor, for repairs and permanent improvements, is a point which has frequently been discussed in courts of equity; as also, how far he shall be allowed for costs and expenses, and generally, for care and trouble in taking charge of the estate.

When a mortgagee in possession, is necessarily put to expense in defending or securing the title of the property, he is entitled to an allowance for the expenditure. In *Loman* v. *Hide*, 2 *Vern.* 185, the second mortgagee brought a bill to redeem the first mortgagee, who had been put to a great charge in foreclosing his mortgage; and it was decreed that these charges should be allowed him in the account. So in *Woolley* v. *Drag*, 2 *Anstru.* 551, the mortgagee being in possession, had advanced money for fines, on the renewal of leases, under which the premises were held, and they were allowed him. The only question made, was whether he should have full interest on them. And in *Godfrey* v. *Watson*, 3 *Atk.* 518, Lord Hardwicke said, if a mortgagee had expended money in supporting the title of the mortgagor to the estate, where his title had been impeached, it might be added to the debt of the mortgagee. On the same principle, taxes, if paid by the mortgagee, are held to be a proper charge against the estate: 1 *Hopk.* 283, *Faine* v. *Winans.* But a mortgagee cannot charge for trouble and expenses in receiving the rents and profits, although there may be a private agreement for such allowances between the mortgagee and mortgagor: *French* v. *Burr*, 2 *Atk.* 120; *Godfrey* v. *Watson*, 3 *Atk.* 518; *Bonithon* v. *Hockmore*, 1 *Vern.* 316. So the expense of insurance is one for which no allowance will be made, it being considered as the act of the mortgagee for his own benefit, and for which he has no right to look to the mortgagor for remuneration: 5 *Pick.*, *Saunders* v. *Frost;* 3 *Pow. on Mortg.* 957.

As it respects improvements, there appears to be some contrariety of decisions; but I have no hesitation in saying that when a mortgagee in possession, undertakes, without the consent and approbation of the mortgagor, to make improvements on the property, though they may be of a beneficial and permanent character, he does it at his peril, and has no right to look for an allowance at the hands of the mortgagor. This is the sound doctrine of this court, and it is founded on principles of equity and good conscience. It would be unjust that a mortgagee, or a voluntary purchaser under him, getting possession of the mortgaged premises, should be at liberty to improve it as he thought most beneficial to himself, and thereby, perhaps, deprive the mortgagor of the power of redeeming. The improvements may be beneficial in themselves, but if the mortgagor does not choose to have them, the mortgagee has no right to impose them upon him. In *Bostock* v. *Blakeney*, 2 *Bro. C. C.* 656, there was a trust fund created by will, to be laid out in the purchase of lands. The estate was purchased, and part of the trust money was laid out in building a house, and making improvements. Lord Thurlow held, that it was a misapplication of the fund, and refused to allow it, although the estate itself would be benefited. The current of English authorities is in accordance with this one; the only variation is, where lasting improvements have, in one or two instances, been erroneously, or by a latitude of construction, placed under the head of *repairs: Swan* v. *Swan*, 8 *Price*, 518; and the late case of *Marshall* v. *Case*, *Mich.* 1824, cited in 3 *Powell*, 957. Even in those cases, the ordinary rule is admitted, that money laid out in improving premises, does not create a lien. The same safe rule has been adopted in our own courts. In *Russel* v. *Blake*, 2 *Pick.* 505, it is expressly decided that a mortgagee cannot claim allowance for improvements made on the mortgaged premises, but only for keeping them in repair; and in *Cable* v. *Moore*, 1 *Johns. Ch. Rep.* 387, and 1 *Johns. Ch. Rep.* 27, *Green* v. *Winter*, the chancellor says, such an allowance cannot be made consistently with established principles. There certainly can be no hardship in this rule. A mortgagee is no more bound to improve the estate, than the mortgagor is. If the mortgagor make improvements on the premises, after giving the mort-

gage, the whole of them shall go to satisfy the mortgage if it be necessary. He cannot say to the mortgagee, these improvements were not embraced originally under your lien, and therefore you are not to have the benefit of them. And so if the improvements are made by the mortgagee, they are voluntarily made, and he cannot turn round afterwards and claim allowance for them. They will enure to the benefit of the estate, and if he should suffer a loss, the maxim will well apply, "*volenti non fit injuria.*"

The principal difficulty arises on the subject of repairs. It is well settled, that a mortgagee in possession is not bound to expend money on the mortgaged premises, any further than to keep them in necessary repair: *Godfrey* v. *Watkins*, 3 *Atk.* 518; *Russell* v. *Smithies*, 1 *Anst.* 96; and for such expenditures, when incurred, he will receive allowance: *Moore* v. *Cable*, 1 *Johns. C. R.* 385. Even this has been looked on with great jealousy, and I think with some reason. And in the case of *Trimleston* v. *Hamill*, 1 *Ball & Beat.* 385, the court held that even in the case of repairs absolutely necessary, it was incumbent on the mortgagee to apprise the mortgagor, as soon as possible, of the extraordinary expenditure. I see no use in such notice, after the expenditure is made. If the court had gone on the broad principle that no repairs should be made, without the previous consent of the mortgagor, I should have considered it a safe rule. I do not see that this case has been followed; and finding the law settled that an allowance is to be made for repairs, it remains to inquire what are the repairs for which the party may claim compensation. The language of the books is, "necessary repairs;" and this language has been construed strictly. In *Saunders* v. *Frost*, already cited, it was sought to charge as repairs, the expenses of making an aqueduct; but it not appearing that without the aqueduct the mortgaged premises would not have been supplied with water, the charge was disallowed. In *Moore* v. *Cable*, 1 *Johns. C. R.* 387, before cited, the clearing of wild land was not considered a necessary reparation; and Ld. Manners in the case from *Ball & Beatty*, above referred to, puts such allowance on the ground of absolute necessity for the protection of the estate.

I am satisfied to keep within the strict rule. It appears by the testimony, that the mill and machinery was in rather better order

when Haight took possession of it, than when Smith left it. It had received some repairs. If the mill could have been used with the machinery as it was when Haight voluntarily took possession of it; if the repairs made, were for the purpose of increasing its speed, or enabling it to do a greater amount of work than it had formerly done, when its machinery was in order, so as to enhance the benefit of the possession, then no allowance is to be made for the repairs. If any expense was incurred in preparing the mill to receive the new machinery, which was not sold, and which was exclusively for the benefit of Haight, such expense cannot be allowed. The charge for painting is not considered a proper charge. Mr. Rogers, one of the witnesses, says the mill could have been worked with the old machinery without repairs, but not to so good an advantage. At the same time, he says, the machinery was pretty much run down, and wanted repairing. Again, he says, the improvements put by Haight upon the water wheel, the gearing for the water wheel, and the bridge over the race, were indispensable. If they were really indispensable to keep the mill in operation, they ought to be allowed. It is manifest, that as soon as Haight got possession, and had got in the incumbrances, as he supposed, he went to work on the property. His object was to improve it for his own benefit; and in some matters, it may be difficult to distinguish between necessary repairs, and highly beneficial improvements; but it may be done. I am induced to think, from the evidence, that some repairs have been made that call for an allowance. I cannot undertake to say there are none. I shall therefore refer it back to the master to take an account of such repairs, if any, and of the proper allowance to be made therefor.

As to the claim for the judgment and execution of the Paterson bank, there seems to be no difficulty. They bound the property before the sale, and must be satisfied. Whether the agreement between the bank and Haight operated as an assignment, or not, can make no difference. The whole matter of appropriation was considered as open, and if the money is paid to the bank, they must, under their arrangement, receive it for the benefit of Haight.

All further directions are reserved.

CITED *in Elmer* v. *Loper*, 10 *C. E. Gr.* 482.

## JOHN HERBERT v. NICHOL SMITH, SURVIVING EXECUTOR OF B. TUTHILL, DEC'D, AND OTHERS.

B. Tuthill, by his will, after some specific bequests, ordered "that all the rest of his estate, real and personal, be sold by his executors and turned into money as soon after his decease as conveniently might be, and distributed among his children in the following proportions, viz: "two shares to each of his sons, and one share to each of his daughters;" and provided "that none of the legacies should lapse by the death of any of his children, but that, in case of such death, the share of the deceased child should go to his or her issue in the proportions aforesaid; and if such deceased child should leave no issue, then his or her share should go to and among his surviving children, in the like proportions."

Upon the death of the testator his children took vested interests in their respective shares, although payment could not be made until after the land should be sold, which in no wise affected the vesting of the estate.

By this bequest the whole interest or estate in their respective shares, and not a life estate merely, vested in the children, notwithstanding there are no words of perpetuity or inheritance; the intent being clear.

The provision in case of the death of any of the children, with, or without issue, refers to their death in the life-time of the testator; and goes no farther than to prevent the lapse of their legacies. It does not amount to a limitation over, on the death of a legatee after the testator's death, and before receiving the legacy.

The land not being devised, but a mere power of sale given to the executors; between the death of the testator and sale of the land, the beneficial interest was in the heirs; and they were entitled to the rents and profits.

The heirs had also a right to make a disposition or transfer of their vested interest. William, one of the sons, having previous to the sale mortgaged his proportion of the lands to the complainant, to secure a debt, and drawn an order on the executor to pay the proceeds of his share, when sold, to the mortgagee, which was accepted by the executor; the money was fixed in the hands of the executor, and the mortgagee entitled to receive the amount of his debt out of the proceeds.

This order was not a bill of exchange, but a direction to the executor to pay such part of this money to the mortgagee, for a past valuable consideration received; which the executor by his acceptance agreed to do.

A subsequent assignment by the same legatee to the executor of his share in the estate, is subject to the prior vested right of the mortgagee.

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In January, 1812, Benjamin Tuthill, of Middlesex, made his last will and testament, and in 1815 died, leaving the same unrevoked. After giving some specific bequests, he orders "that all the rest of his estate, real and personal, should be sold by his executors and turned into money as soon after his decease as con-

veniently might be, and distributed among his children in certain modes and proportions therein specified. He then provides that neither of the above legacies or shares shall lapse by the death of either of his children, but in case of such death the share of such deceased child shall go to his or her issue; and appointed his wife Anny, his son-in-law Nichol Smith, and his son William Woodhull Tuthill, his executors. Smith and W. W. Tuthill proved the will and took upon themselves the burthen of the trust. The bill charges that W. W. Tuthill took possession, as heir at law, of the share of the real estate descended to him from his father, and received the rents, issues and profits thereof: that he became indebted to the complainant in the sum of six hundred dollars, for which he gave him his bond and a mortgage on the undivided two-ninth parts of three hundred and ninety-one acres, being part of the real estate formerly of Benjamin Tuthill, deceased: that he afterwards became indebted to the complainant in the further sum of one hundred and twenty-five dollars, for which he gave him another bond and also a mortgage on the undivided two-ninth parts of eighty-three acres of salt meadow, being also parcel of the real estate of said deceased. That the complainant, discovering that the premises were held by Tuthill subject to a power of sale given by the testator, and hearing that Nichol Smith was the acting executor and received and disbursed the money, he applied to the executors to know the particulars; and was informed by Tuthill that it was his intention the mortgage should cover the lands, not only, but the proceeds of the lands, and for further satisfaction he proposed to give complainant a draft on Nichol Smith, to which the complainant and Smith acceded; the draft was accordingly prepared, by which Tuthill directed Smith, his co-executor, to pay to the complainant or his order, out of the portion due or to become due to said Tuthill for the proceeds of the estate, the amount of the debts due from him to Herbert the complainant; which order was accepted by Nichol Smith in the following manner: "I accept the foregoing order, to be paid out of the funds above mentioned when I shall receive sufficient for that purpose." The bill further charges, that Smith, with the consent of the other executor, sold part of the real estate and received the proceeds; but refuses to pay any part to the complainant, alleging that he could not pay a part: that Tuthill af-

terwards became insolvent, and died, leaving Benjamin Tuthill his only child and heir at law: that Smith has lately sold to Catharine Wallace the residue of the mortgaged premises, for six thousand five hundred dollars, which he has received in part, and the residue is secured by bond and mortgage: that Smith has been again personally applied to for payment of the amount due on said acceptance: that he altogether declines. The bill prays, that the defendants may be decreed to account for the amount due the complainant: that the debt be declared a lien on the funds heretofore received by Smith, and upon the mortgage debt of Catharine Wallace, and be paid out of the proceeds of the share and interest of the said Wm. W. Tuthill in the real and personal estate of the testator, and that a sale of the mortgaged premises be made for that purpose.

The defendant, Smith, in his answer admits the two mortgages given by Tuthill to Herbert, the execution and acceptance of the draft or order; but alleges that the acceptance was expressed in cautious terms, on the grounds, as understood by both parties, that William W. Tuthill was at that time indebted to the estate of the testator, or to the devisees, in a considerable sum of money, which he had received as one of the executors of the estate, out of the personal estate of said testator, and appropriated to his own use; and which he had no other means of paying save the interest he had or might have in the estate. He admits the sale of a part of the estate as charged in the bill, and the receipt of the money; but says that William's share was credited on the account due from him to the estate or the devisees. That he deemed himself authorized to take this course, both on the ground of his responsibility to the devisees, as well as the ground of a certain transfer executed by William to the defendant: this transfer is dated 3d September, 1817, and conveys to Smith all William's interest and share in the real and personal estate, for the purpose of securing to Smith and the devisees the sum of six hundred and thirty dollars, which Tuthill then acknowledges he had received of the estate and appropriated to his own use. The defendant admits, that, for these reasons, he did refuse to pay any money to complainant, and alleges that he has appropiated William's share to the liquidation of the debt due from him to the estate and the devisees, and denies that he has received enough to

pay it off. He admits the sale to Catharine Wallace, and the receipt of part of the purchase money; and that there is now in his hands of the moneys of the estate, received since the death of William, six hundred and eighty-nine dollars and seventy-six cents, which would have been William's share under the will, *had he been living*, and that on the receipt of the balance of the purchase money that amount will be increased. He has refused to pay over this, under the belief that on the death of William the share in the estate of his father descended to Benjamin Tuthill, the son and heir at law of William; and under the farther belief that the draft or power of attorney, remaining unexecuted, ceased and became void on the death of William. But he is willing to pay over the money, as fast as he shall receive the same, to such persons as are rightfully entitled under the decree of the court.

*G. Wood*, for complainant. The testator, by his will, does not devise his real estate, but gives a power of sale to his executors; in the mean time the land descended to his heirs. W. W. Tuthill took two-ninth parts as an heir at law, subject, under the power of sale, to be converted into cash, which he then takes in lieu of it. By the mortgages, W. W. Tuthill transfers *pro tanto*, and as security for the mortgage debts, his interest in the real estate, to the complainant. This transfer, in equity, would embrace the proceeds of the sale, when the land should be converted into money. The conversion does not change the character of the subject, and especially not for the purpose of defeating a fair transfer. When money is directed to be laid out in land, or land to be converted into money, it is considered in equity as already done: 2 *Mad. C.* 108. This land, at the time the mortgage was given, would be considered a personal fund, and the mortgage a pledge of personal property. The draft and acceptance of 10th February, 1817, though not a regular bill of exchange, had the effect to give the complainant a lien upon the funds in the hands of Smith, when received: 1 *Ves. sen.* 280. The alleged indebtedness of Tuthill to Smith or the estate, if true, could not defeat the right of the complainant. Smith acquired no right to the funds till the assignment by Tuthill to him of the 3d September, 1817, after the giving of the mortgages to complainant, and the acceptance by Smith of Tuthill's draft.

*J. S. Nevius*, for the defendants. The devise of the real estate to be sold prevented its descent to the heirs. The legal estate vested in the executors. W. W. Tuthill could not take possession as heir, and had no right to mortgage it. The mortgage to complainant is void. The will gives two-ninths of the estate to W. W. Tuthill, without any words of inheritance or perpetuity; he had only a life estate in the legacy, till the lands were sold and money paid to him; this did not happen during his life; he therefore could not pledge or transfer it. From the whole will it appears that the testator meant to provide for the issue of the legatees, not only in case they should die before him, but at any time before they received their legacies; and the intent must prevail: 4 *Kent's C.* 519, 521. The instrument given by W. W. Tuthill to the complainant, called an order on the executor, is in every sense a power of attorney. The acceptance of Smith was no more than an agreement to act under it, in an event that never happened. Tuthill in his life-time had power to revoke this authority, and he did revoke it by the transfer to Smith. His death at least was a revocation. Smith's acceptance did not vary it, for he did not in Tuthill's life-time receive funds to satisfy it. If the complainant's claim was good against the legacy, he should look to the personal representatives of Tuthill, not to Smith. If his claim was good against Smith, it could not extend beyond the amount actually received by him, after deducting the amount due from Tuthill to the estate. The will being so ambiguous as to render it proper the executor should take the opinion of the court in this case, the cost ought to be paid out of the fund in controversy: 4 *John. C. C.* 608.

THE CHANCELLOR. The first inquiry is, what interest did W. W. Tuthill take under the will of his father? Most clearly, a *vested* interest. The payment of the distributive share of William, and all the heirs, could not be made until after the land should be sold. But that does in no wise affect the vesting of the estate. The principle contended for by the defendant's counsel, that the right did not vest until the money was received, is unsound. There is a case to be found in 6 *Ves. jr.* 159, *Gaskil* v. *Harman*, in which the master of the rolls held that a residuary bequest vested only as the property was received; but that was

under very peculiar circumstances, not necessary to be explained, for the decree was afterwards set aside by Lord Eldon: *S. C.* 11 *Ves. jr.* 496. What estate had William in the share given him? The defendants contend it was a life estate only, and that the provision in the will against lapsed legacies is to be applied according to the intention of the testator; not to lapsed legacies only according to their *technical* meaning, but to all the legacies in such way as to create a limitation over after the death of the legatees, whether before or after the death of the testator. And in support of this it is said there are no words of perpetuity or inheritance in the will. Such words are not necessary. The intention of the testator appears to me perfectly clear. He orders his executors to sell all the residue of his estate, real and personal, and gives certain shares of the proceeds to his daughters, and certain other shares to his sons. He provides that the legacies given to three of his daughters shall not be paid to their husbands, but the executors shall retain them and pay the interest to the daughters during the lives of their husbands, and on their death then to go to the daughters or their children. He then adds, "my will further is that neither of the above legacies shall lapse by the death of either of my said children, but in case of such death the share of such deceased child shall go to his or her issue, in manner and proportions aforesaid, two shares to boys and one share to girls; and if such deceased child shall leave no issue, then his or her share shall go to and among my surviving children in the proportions aforesaid." This was a careful and just provision against the lapsing of any of these legacies. He had seven children, some of whom were married, and he might therefore reasonably expect that such provision would be necessary to insure to his descendants a proper proportion of his estate. I see nothing in the will to carry the intention of the testator beyond this. The legacy or share was given to William without any words of inheritance, it is true, but the whole interest or estate vests, unless a contrary intention is clearly shown by the will.

Another inquiry is, whether the bond and mortgage given by Tuthill to the complainant on his two-ninths of the realty, or the order on Smith and the acceptance of it in the manner in which it was done, gave to the complainant any right or lien on the

share or the proceeds of it. There is no doubt, between the death of the testator and the sale of the land, the beneficial interest was in the heirs. William, in common with the others, was entitled to the rents and profits, and received them. And there is as little doubt that he had a right to make a disposition of his vested interest, if he thought proper so to do. How far the mortgage alone might have operated to secure to the mortgagee the property, or so much of it as was necessary to satisfy his claim, it is unnecessary to determine. The complainant rests not only on the mortgage, but on the special agreement entered into with Tuthill and Smith. The order drawn on Smith by Tuthill, in favor of Herbert, was not a bill of exchange, and could have no efficacy as a commercial instrument; but it was nevertheless perfectly competent for Tuthill to give such an order, and for Smith to agree to pay the money when he had funds. It was a direction to pay part of his money to Herbert for a past valuable consideration. It was his own property, and he was competent to transfer it, and actually did so. The money was fixed in the hands of Smith the moment the order was accepted and the undertaking complete: *Yates* v. *Groves*, 1 *Ves. jr.* 280.

The assignment by Tuthill to Smith of all his right in the estate, cannot affect the complainant's claim. It was made in September, 1817, which was long after the date of the mortgage, and the order on Smith, and the agreement by Smith to pay the money, and of consequence was subject to it as a prior vested right, which no subsequent transaction between Tuthill and Smith could defeat. The complainant then is entitled to recover the amount of his claim out of the fund, provided there be a sufficiency to satisfy it; of which I understand there is no doubt. Let an account be taken, 1. Of the amount due the complainant for principal and interest: 2. Of the amount of assets received by William Tuthill before the order on Smith, and also the amount received by him since: 3. Of the amount received by Smith, and the money still outstanding, and what proportion of the same is still due on the share of Tuthill.

The question of costs, and all farther equity and directions, are reserved until the coming in of the master's report.

CITED *in Gest* v. *Flock*, 1 *Gr. Ch.* 114; *Berrien* v. *Berrien*, 3 *Gr. Ch.* 39; *Fluke* v. *Fluke*, 1 *C. E. Gr.* 480; *Current* v. *Current*, 3 *Stockt.* 188.

## THE DUTCH CHURCH AT FREEHOLD v. SMOCK ET AL. BILL AND CROSS-BILL.

H. Smock, by his will, gives to his wife "the sum of six hundred dollars, to be at her disposal during life." To his four daughters he gave one thousand dollars each: for the payment of debts and legacies authorized a sale of his personal property, and so much of his real estate as might be necessary: devised the residue of his real and personal estate to his two sons; and appointed his two sons and a third person executors. One of the sons conveyed his interest in the land to the other, who mortgaged it, and suffered a judgment, on which the equity of redemption was sold by the sheriff to a stranger. The personal estate proving insufficient to pay the debts, the deficiency was advanced by the executors. The widow died, without having received or disposed of her legacy. The master reported the legacy, and interest, due, to her executor; balances due on the legacies to two of the daughters, and the amount so advanced by the executors.

By this bequest the widow took an absolute and vested interest in the legacy to her, and not merely a life estate with a power of disposition during life. Her not having received or disposed of it in her life-time, or the fact that it must now be raised out of the real estate in the hands of a purchaser, does not alter the nature of her estate.

Where an estate is given to a person generally, with a power of disposition, it carries a fee. The only exception to this rule is, where the testator gives, to the first taker, an estate for life *only*, by express words, and annexes to it a power of disposal; in that case the devisee for life will not take a fee.

Where the master, not supposing it referred to him, expresses no opinion on a material point; if either party have farther evidence, and desire it, a farther reference will be ordered.

If the executor, while owner of the land, had paid the deficiency it was liable to pay to satisfy debts and legacies; it would have been considered paid in easement of the land, and the property would have been discharged.

The master having stated the executors' accounts jointly, and it not appearing by which of them the excess of the debts, &c. over the personal estate was advanced, a farther reference ordered.

The original bill in this cause was filed for a foreclosure and sale of certain mortgaged premises, in the county of Monmouth. The mortgages were given by Garret H. Smock and wife, and belonged to the complainants. After the execution of these mortgages, Garret H. Smock confessed a judgment in favor of John W. Holmes and Gilbert Van Mater, as trustees of Micah Clark, late Micah Polhemus. Upon this judgment an execution issued, and the mortgaged premises were sold by virtue of that execution, and purchased by the trustees for the sum of five dollars, subject

to all legal incumbrances. It appears that the property formerly belonged to Hendrick Smock, the father of the mortgagor, who died in 1814, leaving a last will and testament. In this last will, he orders that his wife Sarah shall have certain chattels and also certain privileges, therein particularly designated, and gave her also six hundred dollars, to be at her disposal during life. To his daughters Elizabeth, Sarah, Jane and Ann, he gave one thousand dollars each, to be paid when they should respectively attain the age of twenty-eight years. He directed his debts and legacies to be paid by his executors, out of the first moneys they received; authorized a sale of his personal property for their payment, and that being insufficient, so much of his real estate at Freehold as might be necessary. The residue of his real and personal estate he gave to his two sons, Garret H. Smock and Hendrick Smock. In 1819 Henry conveyed his moiety to Garret. At the time of the sheriff's sale, public notice was given by the executors of Hendrick Smock, that a part of these legacies was unpaid; and that there was due to the widow on her legacy, nine hundred and twenty dollars and twenty-five cents; and that the sum of two hundred and seventy-five dollars and thirty-five cents was due to Jane, and four hundred and sixty-nine dollars and twenty-three cents to Ann, as the balance of their respective legacies; and also that there was a balance due to the executors, for monies paid out by them in satisfaction of debts and legacies over and above the personalty. All these were claimed to be liens on the mortgaged premises, being the estate in Freehold mentioned in the will. The complainants admit the prior lien of the legacies, and pray a sale of the property to discharge the incumbrances in their order.

The answer of the trustees of Micah Clark, whose rights are the most seriously affected by these claims, questions the amount due to the several claimants or legatees as set forth in the bill, prays an account, and submits whether by the true construction of the will the legacies are properly liens on the land.

The answer of the executors of Hendrick Smock admits the facts as charged in the bill.

The trustees of Micah Clark hereupon filed their cross-bill; in which they allege that the legacy to Jane was paid off by Garret H. Smock: that *Ann* had agreed to take, and had actually ta-

ken, Aaron Smock for the balance of the legacy bequeathed to her: that the widow always lived with Garret and was supported by him, and it was agreed that such maintenance and the property taken by her from the inventory according to the directions of the will, should be in full satisfaction of the life estate and interest in the six hundred dollars given by her husband; that the widow had lately died, leaving Aaron Smock her executor: that the legatees trusted to the personal security of Garret, but finding him embarrassed, they now colluded with him to protect his property and injure honest purchasers. They pray that the premises may be held discharged from any of the liens set up against them, save the mortgages.

The defendants to this bill deny these allegations; and insist that the widow in her life-time lived only part of the time with Garret, and that she fully compensated him for any extra services rendered: that for a number of years she voluntarily receipted him for the payment of the interest on the legacy of six hundred dollars, but always claimed right to the principal sum; and they further insist, that the balances due are charges on the land, and to be first paid and satisfied.

On the hearing of the cause, it was adjudged that the lands were charged with the legacies by the legal construction of the will; and by a decretal order of the term of July, 1829, a reference to a master was ordered, with directions, among other things, to take an account of the amounts respectively due to the said legatees, including the legacy given to Sarah Smock, the widow of the testator, now deceased; and of the personal assets of the said testator, not specifically bequeathed; and to ascertain and report whether all the debts of the testator have been paid, and what amount, if any, is coming to the executors of Hendrick Smock, deceased, or any of them, for moneys overpaid and advanced by them.

The master reported, that at the date of his report, viz. on the 12th day of January, 1830, there was due to Jane Vanderveer, late Jane Smock, one of the legatees, two hundred and forty-three dollars and eighty-three cents; and to Ann Conover, formerly Ann Smock, another legatee, four hundred and sixty-eight dollars seventy-one cents; and to the executors of Sarah Smock, ten hundred and fifty-two dollars and ninety-four cents, if the chan-

cellor shall decree that the same is to be paid out of the estate; and also that there was due to the executors four hundred and six dollars and one cent, for money overpaid and advanced by them.

*G. Wood*, for J. W. Holmes. As to the sum reported due on the legacy to Jane Vanderveer, which was charged on the land, we set up in the cross-bill, and now insist, that it was paid; and refer to the evidence of George Clark. The master has allowed the principal and interest of the legacy to the widow, when, in fact, there was nothing due. The principal was at her disposal during life; she had not an absolute estate in it, but only an estate for life. Upon her death it did not pass to any one, except under the residuary clause. It is only charged on the real estate in aid of the personal. The legacies were to be paid out of the personal estate if sufficient, if not then out of the real estate. This legacy to the widow was raised out of the land. The executor, while owner of the land, satisfied the interest, and stood ready to pay the principal if she had required it. But she not having required it, or made any disposition of it during her life, it must return to the same fund out of which it was raised: 2 *Mad.* 107; 7 *Ves. jr.* 435. The object of turning the realty into personalty, is for the particular purpose of satisfying this legacy; without this it would not have been changed: 2 *Mad.* 110. It will not now be raised out of the realty, to be paid to the executors of the widow, to be distributed to the next of kin. As to the interest of this legacy, it is paid. She was supported by G. Smock, one of the executors and residuary legatees, during her life, which satisfied the interest. The master was to take the account; he should have made all just allowances, and ought to have allowed for this: he has not done so, but submitted it to the court, which is incorrect. The master has also allowed the excess, paid by the executors beyond the personal estate, to satisfy debts and legacies; which is improper. G. Smock, the executor and devisee, has no right now to charge this on the land in the hands of a purchaser.

*Mr. Frelinghuysen*, for G. H. Smock, the executor. There is no reason why the executors should lose the excess which they have paid to satisfy debts. The account was fairly settled in the

orphan's court, and exhibits the sums paid and amount due to the executors; and it appears by the will, that if the personal estate was exhausted the real estate was to be charged. As to the legacy to Jane Vanderveer, G. H. Smock, in the answer and cross-bill, has sworn that it was due: George Clark's evidence to the contrary, is only of loose conversation with Smock: it does not amount to any thing conclusive; and if it did, he is interested in the mattar. The will gives the legacy of six hundred dollars to the widow during life, to be at her disposition. The use is declared: it amounts to a fee. She died before it was paid. The trustees of Mrs. Clark bought the property with full notice of this claim. If it be not an absolute bequest, the legacy, unexpended, will go to the residuary legatee. But that question does not come up here; Mrs. Clark's trustees have no concern with it. It appears that G. H. Smock paid up the interest to April, 1819. It is true, the old lady since lived with him; but there was no contract that this was to go for the interest she was entitled to receive. She was no burthen to the family, and her executor is now entitled to receive the principal of the legacy with the interest from 1819, reported due.

THE CHANCELLOR. To the report of the master, on the several matters referred to him, exceptions have been taken by the trustees of Micah Clark; and these exceptions are now to be disposed of.

And first, as to the balance of the legacy due to *Jane Vanderveer*. It is alleged by the exceptants in their cross-bill, that this legacy had been fully paid by G. H. Smock; and the testimony of George Clark is referred to, to prove it. George Clark is the husband of Micah Clark, the cestui que trust, whose rights are involved in this controversy; and he has acted as the efficient agent of the trustees in the management of the whole concern. Without examining the question of his competency, I think the evidence as it stands does not establish the fact of the payment. Admitting it to be true, as the witness states, that Garret H. Smock told him he had an account against Joseph Vanderveer sufficient to meet the balance due on the legacy of his wife, and that Smock further told him there was nothing due to Vanderveer on the legacy, it is but the allegation of the party whose interest it may have

been at the time to represent the legacy as paid. It is not asserted either by the legatee or her husband. There is no evidence to show any acknowledgment by them, that the balance of the legacy was satisfied. Not only so, but they both expressly deny it in their answer to the cross-bill.

I see no reason to disturb this part of the master's report.

2d. As to the legacy to the widow Sarah Smock, now deceased.

The master reports the amount on the 12th January, 1830, to be, principal six hundred dollars, and interest four hundred and fifty-two dollars and ninety-four cents—computing interest from the 1st of April, 1819.

Whether this is an absolute legacy, or whether the principal is after the death of the legatee to revert to the estate; and also whether, upon the evidence, the interest is to be considered as paid, were matters supposed not to be submitted to the master, and on which consequently, he made no report. They are now brought before the court for adjudication.

With regard to the legacy, the words of the testator are, "I also give to my wife the sum of six hundred dollars, to be at her disposal during her life." It appears that she made no disposition of it during her life, and that it remained in the hands of the executors. I am of opinion, nevertheless, that the widow took in it an absolute and vested interest, and not merely a life estate with the power of disposition during her life.

In the case of *Robinson* v. *Dusgale*, 2 *Vernon*, 181, J. S. devised his lands to A. for life; remainder to B. in fee, he paying £400, whereof £200 to be at the disposal of his wife, in and by her last will and testament, to whom she shall see fit to give the same. The wife died intestate, making of course no disposition by will. The plaintiff took out letters of administration, and brought his bill to have the £200. And it was insisted for the defendant that the property was not absolutely vested in the wife, but that she had only a power to dispose of it by will, if she thought fit; and that not having done so, the defendant was not chargeable with the payment of it. But the court took it, that the whole interest and property of the £200 vested in the wife, and that she had power to dispose of it as she thought proper; and therefore decreed it for the administrator. This case is ap-

proved, and the same principle adopted by Sir Thomas Sewell, the master of the rolls, in *Maskelyne* v. *Maskelyne*, *Amb.* 750. So in *Hixon* v. *Oliver*, 13 *Ves.* 108. The testator gave to his wife, Faithy Oliver, £60 a year as her dowry, to be paid to her quarterly by his executor from the day of his death; and the sum of £300 to be disposed as she thought proper, to be paid after her death; and also his leasehold dwelling house and furniture during her natural life. The testator died soon after the date of the will, and his widow survived him about a month and died intestate, without having disposed of the legacy of £300. Her administrator filed a bill praying payment of the legacy. The court held the legacy to be vested and absolute, and that the administrator was entitled to recover, upon the authority of the cases already cited. Ld. Eldon thought in that case that the widow could have disposed of the legacy as she thought proper, not being confined to a disposition by will. See also *Ross* v. *Ross*, 1 *Jac. & Walk.* 154.

The same principle has been adopted in this country. In *Jackson* v. *Robbins*, 16 *Johns. Rep.* 588, Chancellor Kent, in the court of errors of New York, says, we may lay it down as an incontrovertible rule, that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee; and cites the additional authorities of *Reid* v. *Shergold*, 10 *Ves.* 370; *Goodtitle* v. *Otway*, 2 *Wils.* 6. "The only exception to this rule is, where the testator gives to the first taker an estate for life *only*, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases." The same conclusion is drawn and clearly stated in 1 *Roper on Legacies*, 430.

In the present case there was a power of disposal during life. This power extended not only to a part, but to the whole of the legacy; and by consequence, the power was absolute. The omission to dispose of it in her life-time, does not alter the nature of the estate; nor does the fact of its not having been paid to the widow, or that it must now be raised out of the real estate, in any degree vary the case. The purchasers had full notice of

the claim, and it was their duty to inform themselves of its nature and extent.

As to the interest on this legacy, it is admitted that the widow was entitled to it, and that now since her death her personal representatives are entitled to claim it, unless it has been paid or in some way settled between the parties. The master who was directed to take an account of the amount due the legatees, states that there is due to the executors of Sarah Smock, widow, ten hundred and fifty-two dollars and ninety-four cents. This includes interest from April, 1819. But in the schedule to the report, it appears that the master supposes it is not submitted to him whether, upon the evidence, the interest is to be considered as paid; and he has, of course, expressed no opinion on that point. Although this is a proper matter for investigation before a master, I feel unwilling to direct a second reference, and thereby subject the complainants to further delay; But if the order was understood by the parties as it was by the master, it may be that they or one of them may wish to produce evidence to ascertain the facts connected with this charge. The opportunity should be given if desired; and consequently, if either party has further evidence to offer, and wishes an opportunity to produce it, the reference will be ordered.

3d. The remaining exception is to the allowance of four hundred and six dollars and one cent to the executors for moneys paid and advanced by them over and above the proceeds of the personal estate.

By the accounts of the executors, as settled in the orphans' court upon a report of auditors, there appeared to be a balance due them in 1827 of three hundred and six dollars and seventy cents. This, together with the costs of the settlement before the auditors and the orphans' court, and the interest up to the time of the report, is put down at four hundred and six dollars and one cent. The master says there is no evidence to satisfy him that this amount has been received by the executors out of the profits of the estate in their hands, and he adds it to the amount to be paid out of the mortgaged premises.

I am not satisfied with this disposition of it; and yet I am not prepared to say it is altogether incorrect. If the personal estate was insufficient to satisfy the legacies and debts, and the expenses

of settling the estate, the surplus was to be charged on these premises; and under ordinary circumstances there would be no difficulty in making the allowance now claimed. But in this case, Garret H. Smock, one of the executors who claims this allowance, was at the time these moneys were paid out, the owner of these very lands charged with the deficiency. If he had been the sole executor, and had while owner of the property paid the deficiency which it was liable to pay, it would have been considered paid in easement of the land, and the property would have been discharged. If the lien be paid off by the owner of the land, it is as though the money had been raised by sale. The difficulty consists in the fact that there are three executors, and that the final account rendered by them is a joint and not a separate account. Hence it is impossible to say whether this money has been advanced by all the executors jointly, or only by some or one of them. On looking at the vouchers, however, it seems that a very large portion of the payments has been made by Garret; and from all that appears, it is by no means improbable that all the balance claimed, would, if allowed, be put into his pocket. This would be unjust as against the purchasers. The notice given at the sale does not affect the question. If the lien was satisfied and paid, the notice could not revive it. It may be, however, that the whole or a part of this money belongs of right to the other executors; that the assets received by them have been less than their disbursements and allowances for services: and if so, the allowance ought to be made them. These are matters which the court cannot now ascertain, nor can it be done without referring it to a master to take and state the accounts of the executors separately, taking the account settled in the orphans' court as the basis. The report should state the amount of assets received, and the amount of disbursements made, by each separately, together with the proportion of commissions proper to be allowed each one, on the principles applicable to such cases. I shall accordingly refer it to the master to take the necessary account, with leave to examine the executors upon oath touching the same; reserving all further directions until the coming in of the report.

## THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES ET AL. v. THE MORRIS CANAL AND BANKING COMPANY.

The court of Chancery is not the proper tribunal for calling in question the rights of a corporation, as such, for the purpose of declaring its franchises forfeited and lost.

The "Society for establishing useful Manufactures," owning the lands on both sides of the Passaic river at Paterson, the seat of the manufactories, where the tide does not ebb and flow and the stream is not navigable, as the riparian proprietors, are entitled to the use of the stream. They have in it a property, growing out of the ownership of the soil, as sacredly regarded by the law as the right of soil itself; and a right to enjoy it without diminution or alteration.

The right is not confined to the use of so much water as may be necessary for their present purposes. They have appropriated to themselves the use of the stream, and have a right to take out the whole of it for the purposes of their manufactories; provided it is, after being used, again restored to the bed of the river for the benefit of those below; and provided, also, that no one having prior rights is thereby injured.

Every man has the right to have the advantage of a flow of water on his own land, without *diminution or alteration;* but an adverse right may exist, founded on the prior occupation of another. The right is usufructuary; a right to the flow of water, not to the water itself.

The Morris Canal Company, by using the bed of the Rockaway (a branch of the Passaic) as part of their canal, introducing into it the waters brought from lake Hopatcung and other sources, mingling them with the waters of the Rockaway; and on leaving it, taking out water to supply their canal, which is not again returned into the stream before it passes Paterson; do not injure the rights of the Society for establishing useful Manufactures at Paterson, provided they take out no more water than they bring in, and the flow of water at Paterson is not thereby diminished.

The rights of the Canal Company are subject to the prior rights of the Society, and must be exercised in such manner as that the Society thereby sustains no injury.

*Semble.* That the legislature have not power, by a subsequent act, to authorize the taking by a corporation, of streams of water or other property, previously appropriated by charter to the use of another corporation, and essential to the object of the prior grant.

Past injuries are in themselves no ground for an injunction: the province of the injunction is, not to afford a remedy for what is past, but to prevent future mischief. If the injuries were continued, or the right to continue them set up and persisted in by the defendants, this court would, if the facts were properly established, interfere by injunction effectually to protect the complainant.

Soc. for establishing Manufactures v. Morris Canal Company.

The power of the court to grant injunctions in case of nuisance is unquestionable; but the exercise of the power must always rest in the sound discretion of the court, to be governed by the nature of the case.

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The controversy in this case is between two incorporated companies. The Society for establishing useful Manufactures was incorporated by an act of the legislature in the year 1791, with a capital stock not to exceed one million of dollars, "to be employed in manufacturing or making all such commodities or articles as shall not be prohibited by law, and to that end in purchasing such lands, tenements, and hereditaments, and erecting thereupon such buildings, and digging and establishing such canals, and doing such other matters or things, as shall be needful for carrying on a manufactory or manufactories of the said commodities or articles."

The Society was also invested with power "to acquire, purchase, receive, have, hold and enjoy, any lands, tenements, hereditaments, goods and chattels, of what kind or quality soever, to an amount in value not exceeding four millions of dollars, and the same or any part thereof to sell, grant, demise, alien and dispose of."

The bill states that in 1792 the Society went into operation, with a capital of about two hundred and ninety-four thousand dollars. That in the same year and the year following they purchased about seven hundred acres of land at and near the great falls of the Passaic river, in the counties of Essex and Bergen, and selected it as the principal seat of their manufactories. They constructed a canal to take the waters of the Passaic from the bed of the river and direct them through their lands, for the purposes of their incorporation. They afterwards constructed a dam across the river, and also a basin or reservoir, from which the water was taken into the canal. They also purchased the bed of the river. In 1807 they constructed a second canal, below the one above mentioned. The grounds adjacent to the canals form sites for the erection of manufactories; some of which have been let out to individuals, with a reservation of rent to the Society. Besides the sites now occupied, there are on the two canals now erected water privileges not sold nor leased, amounting to twenty-nine mill powers, each worth to the Society four hundred dollars per annum, or in fee four hundred thousand dollars. The lots al-

ready appropriated to manufacturing purposes on said canals, with the buildings and machinery thereon, are worth eight hundred thousand dollars and upwards. The bill goes on to state that other improvements, and the establishment of new and additional manufactories are contemplated, under the confident expectation that the State of New-Jersey will preserve inviolate its pledged faith, and that the waters of the Passaic will be allowed to continue to flow in their natural channel until they shall be appropriated by the Society to the furtherance of the grand objects of their incorporation. Under the same just expectation the district has been incorporated, and the town of Paterson has grown up, and now contains a population of eight thousand inhabitants, a great portion of whom are directly or indirectly concerned in and benefitted by the manufactories there established.

The bill then charges that in 1824 the defendants were incorporated by the legislature of the state, with power to construct a canal between the Passaic and Delaware rivers, and with a capital of one million of dollars. That books of subscription were opened and upwards of seven millions of dollars subscribed, but that the amount of actual bona fide subscription was only four hundred thousand dollars; and that some shares were afterwards subscribed and taken. That the Canal Company went into operation, and have excavated the greater part of the bed of the canal. They have constructed works and machinery in the Rockaway river near *Dover*, and thrown a dam across the river for the purpose of leading the water into their canal. They have erected works at *Powerville* for the same purpose, and threatened that they will at any time hereafter, as they may have occasion, turn the waters of the Rockaway at both those places into their canal. And that about the *middle of July last*, also on the *27th and 28th July*, and in the *latter part of August and fore part of September*, they caused large quantities of water to be drawn out of the Rockaway—sometimes for the purpose of trying their inclined planes, and at other times for the purpose of puddling their canal—by means whereof great, sudden, and unusual depression and diminution of the quantity of water in the said Passaic river have been experienced at Paterson, and the manufactories there prevented from performing their usual operations, and some portion of the machinery has actually stopped for the want

of water. That the Canal Company threaten to take water at other places, and from other branches of the Passaic river. That the works established at Paterson, with those now in contemplation, will, during the summer months, require all the water of the river; and that if the Morris Canal and Banking Company are permitted to take the water of the Passaic for their canal, they will greatly injure the complainants, without being able to compensate for the injury. The bill denies that the water to be brought by the Company from lake Hopatcung into the Rockaway, will be in any wise equal to the water necessary to be taken by them to navigate the canal to Newark; and insist that even if it should be equal, the Company have *no right to commingle* the waters of the different streams, or permanently to *divert* the waters of the Rockaway, and substitute therefor the waters of the Hopatcung, thereby involving the rights of the parties in confusion and difficulty. That the Society are entitled to the natural flow of the river, without liability to the dangers that may result from any interference on the part of the Company. The bill then prays that the Canal Company may be *injoined* from diverting in any wise any of the waters of the Passaic or its tributary streams, and that an account may be taken of the damages already sustained.

The defendants' answer was read at the hearing, and also a variety of affidavits on both sides, to show the state of the water in the Rockaway and Passaic at the times when it is alleged the greatest depression took place, and to make manifest the injury occasioned by such depression. These will be more particularly adverted to hereafter if necessary. It is sufficient now to say, that the defendants, in their answer, insist that the Society for establishing useful Manufactures is no longer an existing incorporation. That many years ago they abandoned the establishment they had formed, and all operations connected with it, and thereby became virtually dissolved; and that the manner in which their operations are now conducted, and the mere having of lots and water privileges, is not in accordance with, but contrary to the spirit of the charter, and is of itself a forfeiture of the grant. They say further, in their answer, that in making the canal it was found necessary to introduce the waters of the Hopatcung lake into the Rockaway; and they admit that they have caused

to be erected dams across the Rockaway at *Dover* and *Powerville* for the purpose of turning again into the canal such of the said waters as may be necessary to supply the same. They admit that such of the waters as shall be taken out at and below Powerville will not be returned into the Passaic till after it shall have passed the town of Paterson; but insist, nevertheless, that the water passing over the falls at Paterson will in nowise be diminished, inasmuch as the waters of the Hopatcung lake and one of the head branches of the Raritan, which will be let into the canal, will be more than that taken out. In answer to the charge of taking the water, and the injury sustained thereby, in July, August and September, 1829, they say that on or about the 11th day of July the water was gradually let into the canal from the Rockaway, for the purpose of trying one of the inclined planes: the experiment was made on the 15th of July, and the water immediately returned into the Pompton branch; and that all the water afterwards taken in July was immediately discharged through Cook's creek into the Rockaway. That during the latter part of August and fore part of September no water whatever was drawn from the Rockaway for the purposes of the canal. And they expressly deny that any diminution of water was experienced or existed at Paterson in consequence of their experiments; and allege that if any scarcity was felt it must have been owing to a defect in the Society's dam or some other cause.

*Mr. Wood*, for the complainants. The objects of the bill are to obtain an injunction to restrain "The Morris Canal and Banking Company" from diverting the waters of the Rockaway (a branch of the Passaic) from the works of "The Society for establishing useful Manufactures," at Paterson: and satisfaction for damages already sustained. The Society was incorporated in 1791, in perpetuity, with ample powers, and provision against forfeiture by *non-user*. They selected the great falls of the Passaic as the principal seat of their manufactories, bought seven hundred acres of land, with the mill-seat and bed of the river Passaic; which is here a private stream, not subject to the *jus publicum* of navigable waters, and capable of becoming private property. In 1792 they constructed their first canal or raceway;

in 1807 a second, and in 1827 a third; affording sites for manufacturing establishments capable of employing all the waters of the river. They erected a manufactory in 1792, and carried it on themselves until 1796, when finding it unproductive, they ceased manufacturing, changed their mode of operations, and adopted another plan of effecting the object of their incorporation, by leasing out water power to individuals for manufacturing purposes. The defendants say that by doing this the Society have forfeited their charter. The third and fifteenth sections of the charter, it is true, contemplate that the Society would carry on manufactories themselves: they are authorized to do so, but there is nothing imperative. The charter also contemplated their operating through the medium of lessees; for there is power expressly given them to demise their real or personal estate, under which they have acted in leasing their water power: *Rev. L.* 109. The means are immaterial, so that the great object of the charter, "the establishment of useful manufactures," is effected. And it cannot be said that, because they have not done *all* they were authorized to do, they have forfeited their charter: *Opin. Ch. Williamson, The Society* v. *The Morris Canal*, pp. 18, 20. There is likewise a provision in the charter for incorporating a district around the principal seat of the Society, six miles square, with various municipal powers. The object was to build up a manufacturing town; and under the plan adopted a town has grown up, containing eight thousand inhabitants, which is now the Manchester of the United States.

The first inquiry is, what right have the complainants to the waters of the Passaic? They own the land, the bed of the river, and the canals: have appropriated the water to their use, and enjoyed it, thirty years before the Morris Canal and Banking Company were incorporated. As riparian proprietors, they have acquired a title to the water without any diminution: *Ch. Williamson's Opin.* 30. They also have a charter right, under the faith of the State, guaranteed by the Constitution of the United States. And this right is equally protected in the hands of their alienees or lessees: *Bank Case*, 4 *Wheat. R.* 316; ib. 518, *Dartmouth College;* 7 *Cranch's R.* 164,. *The Brotherton Indians.* It is objected that these lands were purchased under a general power in the charter, and stand on the same footing as

all other lands in New-Jersey. We admit, as a general principle, that private property, land and water, may be taken for public use, making just compensation; but this does not apply to property already vested in a company under a charter. There is property exempt from this liability. It is so, when the taking of the property would impair the obligation of a contract, or defeat the purposes of a former grant. The legislature could not authorize another company to make a railroad on the bed of a turnpike: this would be a violation of the charter of the turnpike company. They could not authorize another company to make a canal, and take the waters of lake Hopatcung, making compensation to the Morris Canal Company: this would defeat the object of their incorporation. Nor could the State authorize the Morris Canal Company to take the waters of the Passaic; because it would be taking away the very means by which the Society for establishing useful Manufactures are to carry into effect the object of their institution: *Opin. Ch. Williamson*, p. 23 The legislature have no power, by subsequent enactment, to interfere with prior grants; and general words in a subsequent grant, are not to be construed to embrace particular streams, previously appropriated by charter, and essential to the object of the prior grant: *Angell on W. C.* 151; 17 *Johns. R.* 195. A private corporation or franchise is property: it cannot be taken away on pretence that it is wanted for great public purposes. What may not be done directly, cannot be done indirectly. If the legislature cannot take away the franchise, neither can they take away the property which is essential to the exercise or enjoyment of the franchise. We have thus established the right of the Society to the use of the waters of the Passaic.

The Morris Canal and Banking Company was incorporated in 1824. The injury of which we complain, is, that they have taken out of the Rockaway, and other tributaries of the Passaic, as much water as they wanted, *ad libitum*, to the injury of the water power at Paterson; and this not unavoidably, for they might have made an aqueduct to pass over the Rockaway, and avoided an intermixture of waters, and confusion of rights, that may occasion interminable controversy, and serious injury to the rights of the Manufacturing Society at Paterson. But they have purposely locked down into the Rockaway above Dover, made

the bed of the river a part of their canal; and erected a dam and works there, and at other places, to enable them to divert as much of the waters of the Rockaway as occasion may require, to fill their canal, and supply it to the tide water at Newark. By means of these works they took water out of the Rockaway and turned it into their canal, in July, August, and September, 1829.

The last hearing before the Chancellor on this subject was in August, 1829. There is much contradictory evidence, but on one point there is no dispute: that on the 13th and 14th of July, 1829, they did take water from the Rockaway at Boonton, and let it into the canal, to try their inclined plane at Pompton, and kept it in for some time. Here was an actual withdrawal of a large quantity of water from this branch of the Passaic. A depression of the water took place, and was complained of, at Paterson: and the only question is, what occasioned it? the dry season, or the taking of the water out of the Rockaway? There was nothing in the season to account for it; and the burthen of proof, that this effect did not proceed from so obvious a cause as the withdrawal of the water from the Rockaway, is on them. The evidence shows affirmatively that there was such a depression of the water at Paterson, and that it was occasioned by the taking of the water into the canal. When the depression of the water took place, and was complained of at Paterson, the dam was examined, and found to be in good order: the cause of the depression was sought for, and it was ascertained that the waters had been thus diverted into the canal. There was also a depression of the water at Paterson on the 27th and 28th July. These depressions were sudden. The water fell ten or eleven inches. At these two periods, the diminution of water was experienced to such an extent, as to obstruct the working of the mills at Paterson. They did not at the time know of the canal being filled; but on examination found the canal filled with water from the Rockaway, through the works at Boonton. The defendants contend, that the depression at Paterson was occasioned by other causes than the diversion of the water into the canal, and their witnesses depose that at certain points on the stream there was no depression of the water observed. The fact that water was taken in the middle of July, is not disputed; yet they deny that it was taken the latter part of the month. A number of witnesses

prove expressly, that they saw the water running into the canal on the 26th, 27th, and 28th July; and others, that at that period the Rockaway fell suddenly, and the water was so low at Paterson that the mills could not work. These facts are so positively testified to, that it is difficult to doubt. Yet witnesses on the part of the defendants, swear that there was no water let into the canal at that time. This negative evidence cannot outweigh the positive evidence on this point; but it shows how easy it is to cast a shade of doubt over a plain case, and how readily and how secretly the waters may at any time be withdrawn, by means of the works erected by the Canal Company, the manufactories at Paterson obstructed, and Paterson ruined.

As to injury since the last hearing, in August, 1829:—The evidence taken since the filing of the present bill, proves, by the concurrent testimony of a number of witnesses, that there had been water in the canal since the middle of July: that on the 27th and 28th of August there were three feet of water running in the canal; that on the 12th September the water of the Rockaway was again turned into the canal, and on the 14th the water in the canal was three feet deep: that on the 26th, 27th and 28th of August, Crane's mill could not go: that the water in the Passaic was lower than it had been in twenty years, or within the memory of the witnesses: and on the 14th September it was the same case; the waters were so low that the mills could not go. Another set of depositions show, very conclusively, that the taking out of the water to fill the canal, occasioned the depressions in the Rockaway and at Paterson: that although there was no drought, yet the Passaic at Paterson was never known to be so low as the last season, in July, August and September. These three sets of depositions, establish the facts, of the withdrawal of the water by the canal; the depression in the Rockaway and Passaic; and the diminution of the water power at Paterson, in consequence of which some of the mills were stopped and others obliged to go only at half speed, and very considerable damage sustained by the Society and the manufacturers at Paterson. Some of these depressions took place on Mondays, and it is attempted to ascribe them to the retention of the water in the mill-dams over Sunday. But it is proved that the usual depression on Mondays from that cause, was from one and a half to two

inches, which would fill up in the course of the day; but the depression the last season was from nine to eleven inches, and not confined to Mondays or Tuesdays, but lasted with little variation for nine weeks. Besides the Rockaway, several other tributaries of the Passaic (Bear brook, Cook's mill stream, and Esler's mill stream) have been turned into the canal, by means of works and contrivances erected by the Canal Company. With all this evidence before us we are gravely told that the Morris Canal Company have done no injury, and do not intend to do any injury to the manufacturers at Paterson, and this court ought not to interfere to protect the industry and future interests of a population of eight thousand inhabitants, and prevent the invasion and final subversion of their rights.

It is said by the Canal Company that we have no cause of complaint or apprehension, because, although they have constructed works and contrivances to divert water from the Rockaway, yet they intend to bring into the Rockaway, as much water from lake Hopatcung, as they take out to fill the canal. The evidence shows that they have not yet done so. They have taken out water and brought in none; and we believe they will not be able to do it in future: that lake Hopatcung will not be sufficient, during the summer months, to supply the canal in both directions, to Easton and to Newark; and if it should, that sufficient water could not be introduced through the feeder to supply the whole extent of the canal. In September there was a full discharge of water into the feeder, and the head waters of the Raritan were turned in at Drakeville, yet the water only reached to Dover. What is the answer to this? They give us figures; calculations made by an engineer who undertakes to gauge the quantity of water issuing from the lake. As well might he undertake to measure the quantity of water rushing over a cataract, or Æolus to measure the winds. There is no reliance on such calculations, based upon theories which are ever contradicted by facts. The engineer of the Company himself admits, that to supply the canal, they must resort to streams supplied by leakage from it. It is ten miles from the lake to the Rockaway. The leakage of the first five will fall into the headwaters of the Raritan. It is only the leakage of the last five miles that would fall into the Rockaway if it could reach it. But in conveying water

through a canal over a porous soil, much of it will sink into the fissures of the earth without contributing to the supply of any stream, and much more will be exhausted by evaporation. If the canal was filled from the lake, a portion only of this water could reach the Rockaway. It is not practicable for them to bring as much into the Rockaway at Dover, as they must necessarily take out to fill the canal again and supply leakage and evaporation to the tide water at Newark. The pretence that they will bring in as much water as they take out, is a fallacy, having no foundation in truth or the nature of things, urged here to obscure the case, and conceal the fact, that they fall into the Rockaway at Dover to procure an additional supply of water to support the canal to Newark. The Company are involved in this dilemma: if lake Hopatcung will afford a sufficient supply for the canal, then there is no necessity of taking our water from the Rockaway—they can pass over it in an aqueduct: if the lake is not sufficient to supply the canal through its whole extent, then they must necessarily take out of the Rockaway more water than they bring in. By injoining them from taking this water, you confine both parties to their respective rights, and no one will be injured. You do great good by preventing confusion and uncertainty.

Upon plain legal principles we are entitled to the flow of the whole of the waters that in their natural course fall into the Passaic, without diminution or alteration. A riparian proprietor above has a right to use the water, but he cannot divert it even on his own ground, without returning it to the natural channel before the stream leaves his land: *Brearly* v. *Shaw*, 6 *East. R.* 208; *Balston* v. *Bensted*, 1 *Camp. N. P. R.* 463; *Merritt* v. *Parker*, *Coxe's N. J. R.* 463; *Waggoner* v. *Shaw*, 4 *Dal. R.* 211; *Gardner* v. *Newburgh*, 2 *John C. C.* 162, 164; *Ch. Williamson's Opin.* and cases there cited. Yet the Canal Company contend they have a right to take these waters into the canal and carry them past the seat of our manufactories at Paterson. They say, we do not injure you, because we bring into your stream as much as we take out. If this was admitted, it is no justification, for we are entitled to the flow of *the same identical stream*, and not to other water they may choose to bring into it. We deny that they have this right of substitution. The great rule of property is based upon identity; it is of the essence

of property. Although a right to water is not like a right to goods and chattels, because the water itself is transient; yet the right to a flow of the waters of a particular stream, is like the right to an easement, or way leading to land: a man has the same right to it that he has to the property to which it leads, and he through whose land it passes has no right to take it away and give another in place of it. If they can divert part of our stream, they may divert the whole, and give us another. It is no answer to say they are equal. Suppose the sources of the substituted stream should fail, would it then be no injury? The Canal Company intend to take water from the Rockaway at Dover to supply the canal to tide water. If they are permitted to do this for *twenty* years, they acquire a perfect right. If after that lake Hopatcung fails, all we could have would be gone; and having thus acquired a perfect right to maintain their dam and works, and to divert our water, they may do it ever after, and the injury to us is irremediable. To prevent this, we seek an injunction.

The law abhors an intermixture of property, and a party who attempts to break up the lines of distinction is chargeable with the highest amount of damages: *Hart* v. *Teneick*, 2 *John. C. R.* 108; *Armory* v. *Delamirie*, 1 *Stra.* 505; *Lupton* v. *White*, 15 *Ves.* 435; 2 *Ves. and B.* 265; *Pringle* v. *Taylor*, 2 *Taunt.* 150. He who intermixes his property with that of another, so that it cannot be separated or the quantity of each ascertained, forfeits what he brings in. If there is uncertainty in this case, the Canal Company have occasioned it. They have intermixed the waters for the purpose of getting the command of our stream, that on pretence of bringing in water they might take out what they may require. Who is to measure it? How is it to be ascertained that they take out no more than they bring in? We are at the mercy of the Company, their agents, boatmen, or strangers. They may withdraw the water to our prejudice, and no one be found to say who did it. The power this company will have of taking the water at any time, hangs like a calamity over the town of Paterson, suppressing its enterprise and withering its future prospects. The injury is too impalpable to be redressed at law. Suppose the business of the town arrested by the diminution of the water power, the poor thrown out of employment,

contracts broken up, credit prostrated, and property depreciated. These matters are not relievable at law: 1 *John. C. R.* 611. It is a case that can only be redressed in a court of equity, and presents proper grounds for relief. The course is a plain one; each party should be confined to the use of their own waters, and the matter will be put at rest.

*Mr. D. B. Ogaen*, for the defendants. The complainants say, the faith of the State is pledged to support their pretensions. If I really thought so, I would say nothing against them. It is true, the charter is a contract; on that ground only can it be brought within the provision of the Constitution of the United States, relative to the power of the States. It is a contract between the State on the one part, and "The Society for establishing useful Manufactures" on the other. The State has granted this charter to the Society, in consideration that the Society on their part should do and perform certain acts deemed beneficial to the State. The Society must show that they have performed their part, *strictly*, before they can require fulfilment on the part of the State, or claim its protection. This is a sound principle of law and morals, and applies with peculiar force to agreements made by a sovereign State. If a grant be made by the King, or Parliament, upon *a misrepresentation*, the grant is void. The same doctrine applies to States. It results, that if a grant be procured for one purpose, and it is used for another, the grant is void: it cannot be so used. The great object of the State in granting the charter to the Society, was, not merely to enable them to hold lands in perpetuity, but it was, that they should employ their capital in manufacturing. All the privileges were given to the Society on this condition; and the condition being broken, the grant ceases. The facts in this case are, that in 1792 the Society erected a mill, and commenced manufacturing. They discontinued their operations in 1796. From this time they ceased to be a corporation. If they had begun under the charter as they are now going on, it would have been a fraud on the legislature, and their charter would have become void. It follows, that when they cease to manufacture themselves, their charter is at an end. It is said that their rights are saved by the

provision, that no *non user* shall work a forfeiture. But this is not a question of non user, but, whether the Society, by ceasing to carry on manufactures themselves, have not surrendered their charter rights. The moment the end of the institution is abandoned, it amounts to a surrender of their charter. *Slee* v. *Bloom*, 19 *John. R.* 474. A surrender is an act *in pais:* 2 *John. C. R.* 226.

We are told the charter expressly gives the Society the power of leasing real estate. But if their charter terminated when they passed the resolution to discontinue manufacturing, their leases are void. What lands had they a right to lease? Only those that are necessary to the great end of their incorporation. When the end is abandoned, the means must go with it. The legislature intended to be liberal, but they expected good faith. The Society say in their bill, that they *are* carrying on manufactures. But where, and how? In 1814 they subscribed to the stock of manufacturing companies. Then from 1796 to 1814 they had no concern at all in manufactures. The Society has no right at all under their charter to be concerned in the stock of any corporate company. If they have not, then their subscribing for stock is a violation of their charter. In this country, corporations have no powers but those that are expressly given by the charter, or such as are necessary to carry the charter powers into effect. This is the rule in New-York, Pennsylvania, and Massachusetts. The third section of the charter prohibits the Society from dealing, trading, &c. They have a right to invest their surplus capital in stock of the United States, or the United States Bank, but no other right of investment whatever. But it is said the Society have certainly performed *part* of what they were bound to do; that they have leased mill seats for manufacturing purposes; and that is enough to save the charter. To hold and demise land is part of the charter *privileges*, but no part of the charter *duties*. The argument is, if they perform part they are entitled to the whole. Will it be pretended that they have still a right to make a lottery? or that they may establish any manufactory, however small, in any part of the state, and make a canal from thence to Paterson? The argument proves too much, and is therefore bad.

We insist that this Society never had a legal existence as a corporation. The charter, section sixth, requires that their original capital stock should be at least five hundred thousand dollars. The legislature thought they were securing capital to that amount for manufacturing purposes in New-Jersey. That was the contract. Yet they admit that the whole amount of their capital stock, when they commenced operations, was only two hundred and ninety-four thousand dollars. In this they broke the contract: they never had a lawful right to go on.

This bill in this case is not properly verified. There is, to be sure, the corporate seal, and signature of R. L. Colt as the governor of the Society; but the affidavits annexed relate to other matters, and do not prove the truth of the material facts alleged in the bill.

But supposing the Society to have all the corporate rights originally granted, and to have come regularly before the court, what is the relief prayed for by the bill?—1. For an injunction. 2. For damages. I lay the second item out of the question, because this is a mere motion for an injunction to operate prospectively; and because damages are never a ground of relief in a court of equity: they are the subject of relief at law. As to the first item, the injury last summer is no ground for an injunction; the only ground for it is, to prevent *future* damage. Upon the affidavits, I remark generally. The Boonton falls are on the Rockaway river. The Passaic, for a number of miles, is a sluggish stream. The water running over the falls at Boonton cannot reach Paterson under three or four days. If the whole stream was stopped at Boonton, it could not be felt at Paterson under that time. Yet the depression is complained of in three hours after the water was taken out. The Society's engineer, J. L. Sullivan, says, if the Canal Company had brought in as much water as they took out, the depression would not have been felt at Paterson;—as if it had occurred after the water from lake Hopatcung was brought into the Rockaway. This was not the case. The want of water complained of was in July, August, and September; and no water from the lake was let into the Rockaway until late in September. The depression, therefore, does not prove that we do not bring into the Rockaway as much

as we take out. From September, after the water came in from the lake, the canal was navigable continually to Newark, yet no complaint was made. Other witnesses speak of the depression in July, August, and September; and some of them add, that the drought was greater the 29th September than before, and therefore the depression was not owing to the drought. Yet the same witnesses say, that the water was higher after the 14th September than before. Where did the additional water come from? Unquestionably from the great pond or lake, when the canal was filled to navigate it to Newark. Does not this prove that we bring more water into the Rockaway than we take out?

As to the propriety of granting the injunction. In *Roberts* v. *Ambley*, 2 *John. C. R.* 202, the correct rule is laid down by Chancellor Kent. There is no doubt of the power, but it is in the discretion of the court. If an injunction is granted in this case, what will be the effect. You will put a stop to a work in which the State, and particularly the northern and eastern part, have a deep interest. To this work the faith of the State is pledged. It was renewed in 1827, when the State was made acquainted with the true situation of the Canal Company. In 1830 the public faith was again renewed. Under that faith a loan of seven hundred and fifty thousand dollars has been effected. Is this faith to be now violated? And at what time are you called on to do this? Why, at the time when you are asking foreign capital here to carry on works of internal improvement. If this step is taken, there will be an end of public improvements in New Jersey for ever. But considering the case of the Morris Canal as a private affair, in which the faith of the State is not pledged, how stands the matter? Injunctions are granted on the ground that the party fears and apprehends an injury. But two things must concur. 1. The danger must be *certain*. 2. The injury must be *irreparable*. Where it is a matter of doubt or uncertainty, or where the party can have an adequate remedy at law, this court will not interfere. In this case, it is doubtful if the injury will occur. In 1823 the legislature appointed commissioners to make a survey. They reported that the great pond (lake Hopatcung) was sufficient to supply the canal with water. This is important testimony. We prove the same thing by our

engineer, *Beach*, and others, and positively by Professor *Douglass*. On the other side, the witnesses say, the water of the lake is not sufficient. This leaves it a question of *doubt;* if so, then it is not *certain:* and the court will not grant an injunction. This matter can hereafter be rendered certain, then why not wait until this certainty can be obtained. And if the injury happens, it is not irreparable: the remedy is plain. Suppose it should be found that the water is diminished at Paterson; this court would at once injoin the Company from letting the waters of the Rockaway into the canal, and the injury is remedied.

But we are told that no matter how much water we bring into the Rockaway, we have no right to take any out. This brings us to a discussion of the rights of the Society as to the water. What are they? The charter gives the Society no express right as to any stream of water. It gives them the right to purchase and hold lands. They have the right to water, as incidental, but this is no charter right; it grows out of the authority to hold land, and their right as owners of the land: they have no other rights. A corporation is a *fictitious person*, nothing else; the legislature give to this fictitious person the same right to hold lands as natural persons have. We deny that they have any other rights, in land or water, than other persons have. I do not stop to discuss the question whether the legislature have, or have not, the right to take this property for public use. It is not necessary. At a proper time we shall show, that the private rights of a corporation stand on the same footing as the private rights of individuals. The Society claim a property in the *water itself;* there can be no such thing as property in water. It is like air, transient: there can only be a right to the use of water. None of the cases cited as to water, use the term "identity." The great principle is, that I have a right to use the water passing through my land, so that I injure none else. *Sic utere tuo ut alienam non lædas.* The question then is not as to identity of water, but, do I use it to the injury of my neighbor? And the great question in this case is, whether the water is taken so as to injure the Paterson works. If we bring in as much water as we take out, where is the injury? On this subject there is, to say the least, *doubt.* The Canal

Company can have no desire to destroy Paterson. Why should they? It is important to them that Paterson should prosper. If the operations of the Morris Canal Company do injure the Society, when it is made manifest, we must make an agreement with them, or abandon our works. This we offer. Ch. Williamson, in his *Opin.* 25, has decided this point. Then why urge this matter again? Why harass us, with this *third* application for an injunction, and in the face of former decisions? As to the fact: we bring as much water into the Rockaway, as is necessary to navigate boats to that river. What water do we take out? Only enough for navigation. But they say, you want more, for *leakage* and *evaporation* for forty miles; that will absorb a great portion, and you will then of course take out more water than you bring in. This does not follow. If we take out water for other purposes than mere navigation, we must take it out with a considerable *current.* Now, how do they know that we will not bring it in with a current. But suppose I am wrong, and that we bring in just enough for navigation; and take out of the Rockaway to supply leakage and evaporation to Newark; how stands the argument? Why, all we want in addition to what we bring in, is enough to supply leakage and evaporation. As to the leakage, it all goes to the Passaic, and they get it again. And admitting that we also want enough for evaporation; we have a resource sufficient for that. In the former bill, as well as the present, it is stated by the complainants, that the great inducement to select Paterson as the place for the location of their works, was the advantage of having the *Green pond,* the head of one of the branches of the Passaic, as a reservoir. Now what rights would the owner of that pond have, as between him and the Society at Paterson? Would he not have a right to dam it, so as not to diminish the discharge of the pond in time of drought? No doubt he would. If this be so; if the Green pond may be made a great reservoir, and the owner of the pond may use it in any way, not diminishing the quantity discharged in time of drought; then the Morris Canal Company, who are now the owners of this pond, and have the rights of the former owner, can dam this pond and use the water in like manner. Does it not then follow, that the additional quantity of water afforded by

this reservoir, will be sufficient to supply the leakage and evaporation of the canal to Newark? Of this there can be no doubt. The charter of the Morris Canal Company gives them the right to dam the Green pond. The Society have only the right to the ordinary discharge of the pond. If that can be increased, the right is expressly given to the Canal Company: Ch. Williamson's *Opin.* 25, 26. I look upon this whole matter to be *res adjudicata.* We therefore have a right to complain of this proceeding, and hope the motion for injunction will be overruled.

*Mr. Scott*, for the defendants. In an injunction bill, which prays for the high prerogative writ of the court, the complainant must set out a distinct title to the thing, the injury to which is the subject matter of complaint; and it must be properly verified, by the oath of the complainant or by other means. In cases of waste or irreparable mischief, the practice is, for the complainant to set out the title precisely, that it may be traversed. Such setting out of the title is a *sine qua non:* 1 *Mad. C.* 216; 6 *Ves. R.* 384. Now what do the complainants set out? They state, that they were incorporated, bought lands, mill seat and bed of the river at Paterson, &c. And how is the bill verified? By Mr. Colt, as the governor of the Society; not the personal actor in the matters charged in the bill, but the creature of the incorporation. What does his verification amount to? There is not one of his acts set forth in the bill, nor does it state that he is the governor of the Society. What proof then is there, that they bought property, streams, mill seats, &c.? None. They produce no deeds: Mr. Colt has not sworn to it, or any one else. The other affidavits annexed to it prove nothing. *Collet* and *Carrick* swear only as to their own acts. There is no affidavit as to the material mattters, of *right*, of *invasion*, and *injury*, set forth in the bill. This court can only judge on evidence: and there being none, of any right invaded, there can be no relief.

The complainants say that they are *rectus in curia;* that they are entitled to relief, in the character in which they complain; that is, in their corporate capacity. Where is their charter? It is gone. An abandonment of the objects of the charter, is, *ipso facto*, a dissolution of the corporation, especially as to

third persons. They have no right to the *means*, after the *object* is abandoned. If there has been such abandonment, the Society no longer exists. In 1796 there was an actual abandonment of the object of the incorporation, by the resolution of the directors to discontinue manufacturing; a resolution which they had a right to pass, under the last section of the charter. Since this they have not been known as a manufacturing institution. They say they have leased water power for manufacturing purposes. The right to demise is ancillary, and incident to the right to hold lands; it is not a substantive right. They have no right, under their charter, of dealing in water powers, as such, without reference to the great end in view: it is not the object for which they were incorporated. Instead of going on with the object in view, they manufacture by *proxy*. It is an evasion. This *non user* is *evidence* of a surrender of their charter privileges. They have not performed the stipulations on their part, and have now no claim to the faith or protection of the State. The charter says, that non user of the privileges shall not be a forfeiture; but it does not say, that non-performance of the condition, shall not be a forfeiture of the grant. It is said this court cannot adjudge it to be a forfeiture. True, this court cannot proceed by *quo warranto*, and render judgment of forfeiture. But when the complainants come into this court, as a corporation, they must show that they have legal existence, or this court will refuse relief. In the case in 19 *John. R.* 474, there had been no *quo warranto;* yet it was there considered that the corporation had no existence.

If the Society have a right to come into this court, of what do they complain? An invasion of their chartered rights. What is their nature, and extent? The rights of natural persons are, security of person and property. The rights of a corporation, or artificial person, approximate to these, but cannot transcend them. The rights of natural persons are of a higher order than those of a corporation. As natural persons, corporations are permitted to acquire, hold, enjoy and transmit property: their right to property stands on the same footing as the right of natural persons. It is said that the *waters* of this corporation are inviolable; that they canot be taken for public use, because it would impair the obligation of a *contract*. Can it be, that the houses and lands

of a citizen, can be taken for canals, highways, &c. and yet those of a corporation be favored and exempt? Do not individuals hold their lands and waters by contract? *Private property* may be taken for public use. Is not the property of a corporation, or artificial person, as much private property as that of a natural person? And is not the faith of the State as much bound to protect the property of the one as the other? A corporation has a right to hold according to law, and in no other way. As alienees, they have the title of the alienor, and no more. Does the grant by the State to a corporation, of the power to purchase and hold the property, vary the case? Have not natural persons the same power under the general law? Are lands holden of the State in pure *allodium* inviolable; if not, how can it be said that the waters of the Passaic, purchased by the Society under the authority of the State, are inviolable? I refer to our statute regulating *Tenures, Rev. L.* 166; *Satterly and Mayhew* v. *Hamilton College*, 2 *Peters R.* —; *Jerome* and *Ross*, 7 *John.* 315. The charter of the Morris Canal gives a right to take streams: if that is constitutional, there is an end of this question.

But the complainants claim a right to the *identical* water. In 6 *East R.* 206, Lord Ellenborough, in speaking of the right to water, uses the terms "without diminution or alteration." The one means quantity, the other quality, but neither means identity. The cases adduced to prove that chattels are not to be mingled, are inapplicable: because water is not property, it cannot be recovered as such. As to the right of diversion without diminishing the quantity, the question is already settled by the opinion of Ch. Williamson. The complainants say we have lessened the supply. Our answer denies it, and we produce the depositions of thirty-eight witnesses to the contrary. The evidence is before the court, and it is unnecessary to recapitulate it.

To entitle the complainants to an injunction, they must show well-grounded apprehension of certain, and irremediable injury. Admitting the right of the Society to the waters of the Rockaway and Passaic; the evidence produced by the defendants, the affidavits of Professor Douglass, of Beach and Mason the engineers, show, that the water of lake Hopatcung is sufficient for all the purposes of the canal, and that there is no danger of injury to

the Society. These affidavits are equal to those of J. L. Sullivan, Colt and others. There is, to say the least, uncertainty; and the power of granting an injunction cannot now be properly exercised. If a diminution of the waters of the Passaic, from the operations of the canal, should occur, it is not irremediable. The gates may be hoisted and the water restored: this court can set the matter right. It is said the Society are in danger, as the waters may be diverted by any one opening the gates. That would be an abuse, and is no argument against the proper use, of the water by the Canal Company. We pray that the injunction may not be granted.

*Mr. Southard*, in reply. It is important to recollect the history of this case. It commenced with the incorporation of the Morris Canal. The impression of the Society then was, that the Canal Company intended to sustain themselves without touching any waters of the Passaic. It was said, that the lake Hopatcung was sufficient to supply the canal. The applicants for the charter stated that they meant to fill it from that source. They so represented to the public and to the legislature. Such was the impression of the legislature, and the field book filed by the Company in the office of the secretary of state confirms it. No member of the legislature would have voted for the bill, had they supposed that the water power at Paterson was to be destroyed or injured. The canal was expected to terminate at tide water on the Passaic. After the charter was obtained it was determined to extend it to Newark, and subsequently an extension to Jersey City was contemplated. More water became necessary, and then this difficulty commenced. The Company located their canal, and erected works and contrivances to divert the waters of the Rockaway, and carry them past Paterson, to the injury of the manufactories. The Society, seeing the danger, then called on the late chancellor to protect them by injunction. The chancellor decided, that as no actual injury had yet been sustained, he could not grant it. Some months after, having by that time suffered injury, as we supposed, we applied again on the same bill. The chancellor intimated that it was necessary to file a new bill. We have accordingly filed a new bill, and produced additional proofs.

This is the whole proceeding, for which we are now reproached with having made a third application for an injunction; and told that the matter is *res adjudicata*.

It is said the verification of our bill is defective. It is under the seal of the corporation, attested by R. L. Colt, as governor of the Society. The seal alone would have been sufficient: so says Justice Washington. Beside this, the affidavit of Mr. Colt is perfectly full. John Colt was the agent of the Society; he and three others swear in the usual form: the others are lessees, they could swear in no other way. If this verification be defective, the court will order it corrected. The bill is of double aspect: it prays an account for injury done, and an injunction to prevent future waste. I shall not separate these matters; the great question is, whether the Canal Company have a right to take our water.

As to the facts in this case: Is it true that the works have been erected, and the injury done? I admit, that there is some contradiction in the evidence, but not such as to prevent a clear conclusion. It is proved and admitted, that at *Dover*, where the canal crosses the river Rockaway, the Company have erected a dam and locks. They have here taken the *mastery of the whole stream*. We next come to the *Bear brook:* they take the whole waters of that stream. At *Powerville* there is a dam by which the whole river can at any moment be turned into the canal. Now what was the object of all these contrivances? If it was only to take out as much water as they bring in, would not one dam have been sufficient? It is admitted and proved that they had brought in no water from the Hopatcung until after the injury complained of in our bill. It is admitted and proved, that there has been water let into the canal in that quarter to try their inclined planes and for other purposes, repeatedly, in July and August, as well as in September, 1829. It is no matter whether this was done by the Company, or a stranger; it is the *erection of the works*, of which the Society complain. They enabled some one to do the injury. It is *against these works*, calculated to divert our water, so that it will not be returned to the stream again until after it passes Paterson, that the power of this court is sought to be directed.

The water was taken at three several times in large quantities, and at other times more or less every day, throughout the months of July, August, and September. Was it taken to such an extent as to affect us materially? This is denied; but the denial only relates to the month of July: the taking of water in August and September is uncontradicted, even by the answer of the defendants. The defendants' witnesses, with the exception of *Smith*, speak as to July only. The Rockaway forms about one third part of the river Passaic. What portion of this did they take? They took enough to fill the canal, ten miles in length and three feet deep, in one day. It must have taken all the water of the Rockaway. This was done frequently, to try their inclined planes, which as to water is a most wasting operation; and yet they say it could not be felt at Paterson. The defendants produce thirty-eight witnesses, who, as they say, declare there was no diminution of water. With the exception of *Smith*, and the gentleman at the *Little Falls*, there is not one who had his attention particularly directed to it. They *did not observe it.* This may well be. Mr. Beach was at Paterson, and he *did not* see it or hear of it. At the Little Falls, and at the freeholders' bridge, those who were at work there took no particular notice of it. And what does all this negative evidence prove? Nothing, in opposition to the affirmative evidence on the part of complainants. Our chain of evidence is complete. *Smith* began to mark the height of the water the first of July: he has given us the result. By his marks we find, that on the 11th, 12th, and 13th July, there was an actual depression of from twelve to fourteen inches: on the 27th and 29th, the difference was nine inches: on the 6th September, seven inches; and on the 13th and 14th, there was one day six, and one day twenty-eight inches. Other witnesses speak of the depression in August and September: some of them saw the children playing in the bed of the river. *Van Duyn* kept marks: he says the water fell twelve inches. At the five bridges a boat was left dry on the shore in the space of one hour. *Duryea's* meadow was wet: by the withdrawal of the water it became dry; and wet again when the water returned.

What was the effect? Kitchel's mill is at the mouth of

Cook's brook: he (Kitchel) says, that on the 27th and 28th August, he could not grind for want of water. Crane's mill is similarly situated: it could not be worked on three several occasions. They did not know why it was so: they sought for the cause, and found it in the canal works. Post says the streams were lower at those periods than he ever saw them; Speer says, six inches lower; and Collet says, the water was fifteen or sixteen inches lower than he had ever known it. And what is the testimony in relation to Paterson? J. Colt says there was a diminution of the water there of ten or eleven inches. Rogers, Godwin, and others, prove that some of the mills were obliged to throw off part of their machinery; and one mill was actually stopped, from the 28th August to the 14th September. J. L. Sullivan was sent to examine the cause: he found it, not at the dam of the Society, which had been raised and repaired in July, but at the works of the Canal Company. In this, Blake sustains Sullivan. It is said, we complain of the depression in three hours after the water was let into the canal, which could not be. This is not so: none of our witnesses fix it at less than twenty-four hours. In consequence of this want of water, contracts were broken, and leases violated. That the Society *have suffered*, is now no longer a matter of doubt. And we come before the court in the situation in which the late learned chancellor said we should come.

It is true, that during the period above alluded to, in which the Canal Company were continually operating, more or less, they had brought no water into the Rockaway from the Hopatcung: and they say that, if the water of the Great pond had been running into the canal in July, August, and September, it would have helped us. It might, in some measure; but would it have protected us from injury? We think not. We believe that the Hopatcung is not sufficient to supply the canal. Who has measured it, and without admeasurement who can tell? They give us calculations made by Professors Renwick and Douglass; between their estimates there is a difference of one half in quantity: yet upon such calculations you are asked to doubt, and leave our rights to destruction.

They calculate, too, upon the whole water of the lake as if

they had a right to take the whole supply of that reservoir for the use of the canal. That lake is the source and supply of the Musconetcong creek, on which there are forty-five mill seats. They have forgotten these mills, or they desire to use the head waters of the Musconetcong only to *Dover*, on the eastern section of the canal, and then take our water to supply them to Newark. They want to break us down, to avoid the difficulty with the mills on the Musconetcong.

They say they will take out just as much water as they bring in. Is there any evidence that they will take out no more? They will empty into the Rockaway a *lock full* at the passage of every boat, and take out a *canal full*, enough to float their boat to Newark. Their dam commands the whole stream; who is to prevent their taking out more than they bring in?

You are told, that if you injoin now, the faith of the State will be violated. Not so. If their water from the lake is sufficient, they can pass over the Rockaway in an aqueduct, and not interfere with our water: there is then no necessity of taking it. But if the water of lake Hopatcung is not sufficient, then they must necessarily take our water, and injure us, and the question is settled. If they are restricted to their own water resources, and they are insufficient to sustain them, and they sink, it will be by their own folly and default, in deceiving themselves, the public, and the legislature; and they will fall justly.

Having shown the wrong and injury, the question arises, by what authority is this wrong done? They answer, the charter: we deny it. The charter, we say, contemplated no such thing. The commissioners appointed by the legislature, reported, that there was water enough in the lake Hopatcung to supply the canal to tide water on the Passaic. The small streams which the commissioners said might be taken to increase the supply, are, the head waters of the Raritan, and the tributaries of the Musconetcong and the Delaware. They were studious to show that the head waters of the Passaic were not to be interfered with. Green pond, one of the sources of the Passaic, is not mentioned in the communications to the legislature previous to the passing of the law; but it is found in the law itself. The mentioning it there, proves that the legislature did not intend that any other of

the waters of the Passaic were to be used by the Company. And all they are entitled to of this pond is, only the advantage of it as a reservoir, or the use of the additional water that may be accumulated there in the wet season: its ordinary flow is not to be interrupted.

But if the Canal Company were authorized by their charter to take the waters of the Passaic, they have yet acquired no right under it. By the sixth section of the charter they are directed to make a map of the lands, waters and streams required for the use of the canal, and file it in the secretary's office, with an affidavit of the engineer that the premises are necessary, and not more than is requisite for the purposes of the act. After doing this, they can only take what they have so described. We have here the survey from the secretary's office: it contains nothing to justify a pretence that they are to take any water of the Passaic or its tributaries. They do not swear that they are necessary; if they did, it would be giving up this question. They mention the *passing* of the Rockaway in the same way that they mention the passing of other streams. Over all they pass in aqueducts, except the Rockaway. They are also required to compromise and settle with the citizens before taking their property: they have not done, or attempted to do it with the Society. In case of a failure of compromise, they should have resorted to the tribunal appointed by the act itself, the commissioners. As to this tribunal, I do say, that, according to my view of the subject, it is *unconstitutional.* It is taking away the *trial by jury.* I refer to Judge Paterson's opinion, in the case of *Van Horne's Lessee* v. *Dorrance,* 2 *Dall. R.* 104. But if it is constitutional to take our property in the way prescribed, the Company must first do what the charter requires. They must appraise it, and pay us for it, and that in *money;* they cannot make us take *water,* brought from some other source, for our compensation.

I have looked at all their justifications, and think the Canal Company cannot find, in the report of the commissioners, in the act of incorporation, nor in a compliance with its provisions, any apology for the acts of which we complain. The proceedings of the Company are an abuse of their corporate powers, and therefore a ground for injunction. They assume the power to inter-

mix their rights with the rights of others, without their consent, and to their prejudice. Such an intermixture is the foundation of an action for damages, when it takes place. But when they say they will continue it, without end, then it is proper for the court of chancery to interfere. By this intermixture they create uncertainty as to our rights. Who is to measure the extent of our rights, and mete them out to us? This difficulty must occasion endless litigation, until by acquiescence or lapse of time our rights are extinguished. To prevent litigation is the office of an injunction. The injury of which we complain can only be arrested by the powerful arm of this court.

Our opponents say, that we are not in a situation to complain, for many reasons. 1. It is said we have not produced title. It is never required. We have set it out in our bill, and that is verified, which is sufficient. 2. It is said we were never legally incorporated, not having five hundred thousand dollars subscribed. The legislature incorporated the Society on the subscription of two hundred thousand dollars, previously made: but it is stated in the bill that the subscriptions were six thousand one hundred and twenty-two shares, upwards of six hundred thousand dollars. 3. Again, it is said we have surrendered our charter privileges, by a resolution in 1796. The *stockholders* never made such a resolution. They alone had power to dissolve, but they refused, and instead of it elected a new board of directors. 4. It is also said we have surrendered by *non user:* that this non user is *evidence* of a surrender. But when by express provision of the charter (*Rev. L.* 124) non user cannot *create a forfeiture*, can it be evidence of a forfeiture? Lastly, it is said we have abandoned the *object* of our incorporation, and therefore our rights are gone. The object was, to *establish* manufactures: this we have successfully accomplished.

The legislature, however, do not regard this Society as dissolved. They have recognized the legal existence of the Society, time after time, by a series of acts, resolutions, reports, and proceedings (which the counsel here recapitulated) from 1804 to 1826. In 1826 the State received a deed of conveyance from this same corporation: could it then be extinct? The Society can only be declared *non existent* by the operation of a *quo warranto*.

There is no such power in the court of chancery. No third person can come here and say, this charter has been violated, and is therefore void. Whether the Society have power to make a lottery or not, or whether they have power to make canals throughout the State, is not now the question; if it was, I should say they have the same power on these subjects as they ever had.

Having shown, as I trust, the existence of our corporation, I now proceed to show that our *title to the water* is complete. The object of the Society was, to establish manufactures. At that day, *water power* was the only means of carrying them on. Without this they could not succeed, and all other rights would be good for nothing. The Society took possession of the waters of the Passaic. I do not mean the *identical water;* but I mean the waters of this *identical stream.* It was a private stream; they bought it. The purchase of the banks would have been sufficient; but they bought the bed of the river, and acquired a right to the natural flow of this stream. If the water could be withdrawn, or the flow of the stream diverted or changed, what did they purchase? Nothing; or what was of no value. But they purchased the *water power* at Paterson. That consists of the uninterrupted flow of water from all the fountains or streams of water in their natural course emptying into the Passaic: combined with the descent or fall of water at Paterson, which constitutes water power. This is a species of property not unknown to the law, but capable of ownership, of intrinsic value, and like all other property entitled to protection. At that time the Society looked to Green pond as one of the tributaries of the Passaic, as appears by their minutes prior to their location. If we purchased the water power, and entered upon it, and used it twenty years, we have as good a title as any grant can give; a title that no constitutional power can wrest from us: *Campbell* v. *Smith,* 3 *Hals. R.* 140. If we had no charter privileges, our rights are absolute. This is not the case of a mere purchase of lands, in *allodium* or otherwise; but it is a case where the State, by granting a charter to the Society, for certain special purposes, has pledged its faith to protect the property of the Society lawfully acquired, and essential to the purposes of their incorporation. To this end we pray the injunction.

THE CHANCELLOR. In the consideration of this case, I shall assume that both corporations have legal existence. As it regards the defendants, no objection can be raised against their existence as a body corporate by these complainants. They have brought them into court as a company; the direct object of the bill is to operate upon them as a company and in no other capacity, and so they must be considered by the court. So, on the other hand, the allegations of the defendants, that the Society is virtually dissolved; that they are acting in direct opposition to the spirit of their charter; that they are speculating in perfect security on the very extensive privileges granted them, without incurring any corresponding risk, or embarking any of their capital in the manufacturing and making of such commodities as are mentioned in the act of incorporation, and therefore their charter rights are forfeited and gone, cannot avail them at this time, or before this court. The case of *Slee* v. *Bloom*, 19 *Johns.* 474, was cited and relied on by the defendants' counsel, to show that a corporation might be considered in a court of equity as having forfeited or surrendered its charter, by doing or suffering acts to be done which destroy the end and object for which it was instituted. That case was decided by the court of errors, and reversed the decree of the chancellor as found in 5 *Johns. C. R.* The learned judge was of opinion, that the court of chancery was not the proper tribunal for calling in question the rights of a corporation, as such, for the purpose of declaring its franchises forfeited and lost; and this, as a general principle, I take to be correct. But without admitting or denying the authority of the particular case cited, it is enough to say that the present one is not within it. In that case it appeared, among other things, that the stockholders had come to the resolution to abandon the factory and corporation altogether. No such fact is before me in relation to this corporation. The charter granted to the Society for establishing useful Manufactures, was exceedingly liberal. It was intended to promote a great national object, and well calculated to afford extensive protection to exertion and enterprize. It was created in perpetuity, and the ordinary and natural effect of non-user was expressly provided against. How far the risk and enterprize of the Society are commensurate with the privileges and

immunities conferred on them; how far the mode of operation lately adopted by them comports with the spirit and intention of the charter; and whether any of their acts or omissions may legally be construed to amount to a surrender, abandonment, or forfeiture of the charter, are questions that properly belong, as I conceive, to another tribunal. They are matters upon which it does not become this court to express any opinion.

Considering, then, both parties as properly in court, I shall inquire, in the first place, what are the rights of the plaintiffs, as exhibited by the case made.

The river Passaic, at the town of Paterson, is not a navigable stream. The tide does not ebb and flow, nor is the stream navigated by boats or craft of any kind. The Society, at the place selected as the seat of their manufactories, own the land on both sides of the river, and have had the possession for many years. They are the riparian proprietors, and upon plain and acknowledged common law principles they are entitled to the use of the stream. They have in it a property growing out of the ownership of the soil, which is ofttimes of more value than the soil itself, and at all times as sacredly regarded by the law. This being the case, they have a right to enjoy it without diminution or alteration. Lord Ellenborough, in the case of *Bealy* v. *Shaw*, 6 *East.* 208, says, "The general rule of law, as applied to this subject is, that independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration: but an adverse right may exist, founded on the occupation of another." This right, at all times valuable, is to the Society vital. Their hopes and expectations not only, but their very existence are dependent on it. The right is not confined to the use of so much water as may be necessary for their present purposes. They have appropriated to themselves the use of the stream. They have a right to take out the whole of it for the purpose of their manufactories, provided it is again, after being used, restored to the bed of the river for the benefit of those below; and provided also that no one having prior rights is thereby injured. Such I take to be the common law rights of the Society, independent of any additional privileges that may be secured to them by their charter.

What they may be, if any exists, it appears to me unnecessary now to inquire.

I propose now to consider the rights of the defendants, and how far, if at all, they interfere with those of the complainants; and whether, in the exercise of those rights, any injury has been done to the plaintiffs; and whether, in the further use of them, the plaintiffs will be so *certainly* and *permanently* injured, as to justify the interference of the court at this time by injunction.

And first, as to the rights claimed by the defendants. I do not understand them as claiming a right to the *ad libitum* or unrestrained use of the waters of the Passaic, or its tributaries, subject to the payment of a compensation or damages to the Society for establishing useful Manufactures. If such claim was set up, it would be necessary to inquire how far it could be supported as against the chartered rights of the Society. But I consider that question not properly before the court. They claim, under the act of incorporation, the right to construct a navigable canal from the Delaware to the Passaic. They claim the use of the waters of lake Hopatcung, and of the extra water of Green pond. They claim to bring the water from the Hopatcung into the Rockaway—to make use of that river as a part of the canal, and to take out of it again water for the use of the canal—not thereby diminishing the ordinary and natural flow of the water at the great falls at Paterson.

It does not follow, that, because a person as riparian proprietor has a right to the flow of a stream, and to use it for the purpose of manufacturing, or any other purpose requiring the use of water, that therefore no other proprietor or person shall be at liberty to use for the same or like objects the water above him. This would be contrary to natural justice and the reason of things. Each one has a right to the use, provided that in the exercise of such right he does no injury to his neighbor: 2 *Blac. Com.* 403.

Now if the Morris Canal and Banking Company make such use of the waters of the Passaic, or any of its tributary branches, as to occasion no diminution in the flow of the stream at the place where it is used by the complainants; and if in such use no injury whatever is done to the complainants; are they not ex-

ercising an ordinary and well established right? Does not the same privilege that is accorded to others belong also to them? It appears to me unquestionable that the defendants have such right as against the complainants, subject to the condition already stated.

But the Morris Canal Company claim the further privilege of introducing into the Rockaway the waters of the lake Hopatcung, and of one of the branches of the Raritan—and then of taking out of the Rockaway below so much water as may be necessary for the purposes of their canal; averring that the waters of the stream will be thereby in no wise diminished. The water thus taken out, it is admitted, is not to be returned until it shall have passed the great falls at Paterson. They say that the supply of water thus brought in, together with the extra supply which they are authorized to take from Green pond, will in times of drought afford to the Society a more copious flow than they would otherwise have, and therefore that it will be a benefit. On the other hand, it is contended by the Society, that the Canal Company have no authority thus to commingle different streams and different rights; that they are entitled to the flow of the identical stream of water, not only without *diminution*, but without *alteration;* that if the claims of the Company in this behalf are sustained, the supply afforded by these substituted streams may in time diminish, and the property and immunities of the Company be jeoparded or ruined. This is supposed to present a question of novelty and importance. It certainly is not the case of a simple diversion of the stream for necessary purposes, returning it again to its natural channel when those purposes shall have been answered; but would seem to be rather a substitution of part of one stream for part of another. The principle that assigns to every thing capable of ownership a legal and determinate owner, is wise and salutary, and promotive of the great ends of civil society. This principle, however, can only be applied to streams of water in a limited sense. There is no such thing as actual property in running water. It is transient in its nature, and must be permitted to flow for the common benefit. The interest is rather of a usufructuary kind, but not the less absolute or vested on that account. To say, then, that a

person entitled to the flow of a stream of water through his land, is entitled to the flow of the very identical substance that issued from the original source, is an assertion of right not easily sustained. It would be tantamount to the ownership of the particular water itself—which cannot be. I do not understand Lord Ellenborough, in *Bealy* v. *Shaw*, to carry the doctrine thus far. His principle is, that every man has a right to the advantages of a flow of water in his own land, without having its quantity diminished, or its quality altered, by the operations of those who might be above him on the same stream. It is not pretended that the quality of the water to be let in from the lake Hopatcung and other sources, is in any way different from the water of the Rockaway. If then the defendants take from the Rockaway no greater quantity of water than they bring in, (and they claim a right to do no more,) will not the Society enjoy their privilege without diminution or alteration, or can they in any wise be injured? But, while the right thus to take the water of the Rockaway for the use of the canal, is accorded to the Company, I think it is easy to foresee that difficulties may arise in its exercise. Whatever these difficulties may be, and whatever may be the risk, and hazard, and loss attending them, they will have been sought by the defendants themselves, and not imposed by others. Their rights, whatever they may be, are subject to the prior rights of the Society for establishing useful Manufactures, and must be exercised in such manner as that the Society thereby sustains no injury. And, in fact, I understand this principle to be conceded. It was candidly stated in the argument by the counsel for the Company, that if in their future operations it became manifest that the Society was injured, the Company must either agree with them for the use of the water, or abandon their work.

The next inquiry is, whether the complainants have already been injured by the drawing off of the water, and whether such injury is continued; and if not, whether the apprehended danger is of that character as to justify the interference of this court by injunction.

And first, as to the fact of the injury, and its continuance. The bill charges that the Company, about the middle of July,

and on the 27th and 28th of July, and in the latter part of August and fore part of September, caused large quantities of water to be drawn out of the Rockaway, sometimes for the purpose of trying their inclined planes, and at other times for the purpose of puddling their canal, by means whereof great, sudden, and unusual diminution and depression of the usual quantity of water was experienced at Paterson. There is no doubt, from the evidence, that water was drawn from the Rockaway for the purposes of the canal, in the month of July, as charged in the bill, and again let into the river. But whether the stream, in consequence of these operations, was sensibly diminished at the great falls, and whether in consequence of it any injury was sustained by the complainants, are matters not so clearly established. There is much contradiction in the evidence, and if it were necessary to settle the facts at this time, I should have strong doubts whether this would be the proper tribunal to weigh and determine upon the mass of conflicting testimony that has been presented to the court. Whether the water was let into the canal at the times when a depression of water is charged to have taken place at Paterson, and whether such depression of water, if it actually took place, was occasioned by the operation of the canal, are also matters of dispute—and I deem it unnecessary to look into the evidence with a view of arriving at any conclusion in relation to them. The question of damages is not now under consideration. If, however, injuries were sustained by the complainants at the particular times charged, those past injuries are in themselves no ground for an injunction. The province of the injunction is not to afford a remedy for what is past, but to prevent future mischief. The effect of the injunction is preventive. If the injuries were continued, or the right so continue them set up and persisted in, this court, would, if the facts were properly established, interfere, and effectually too, for the protection of the complainants. But the defendants make no such claim or pretence; and it is observable, that between the fore part of September and the filing of this bill in January, there is no complaint of any alleged violation of the rights and privileges of the Society.

It appears further from the case presented, that at the times when the water was let into the canal, as complained of by the

Society, there was no water brought into the Rockaway from the lake, and that the water was let into a section of the canal, not for the purpose of navigation, but of making some experiments upon the works of the canal; that the use of the water was *temporary*, and the water itself, or what remained, was returned into its natural channel. It does not appear that the water of the Rockaway will in future be withdrawn for these temporary purposes, preparatory to the navigation of the canal, without the water being brought at the same time from the lake Hopatcung into the Rockaway; nor, if it should, that the water of the river will be sensibly diminished, or any injury sustained by the complainants. Seeing then that some doubt, to say the least of it, rests upon the allegation of the complainants in regard to the alleged injury already sustained; seeing there is no certainty that the water will be in like manner again abstracted for the purposes of experiments; and the right of thus abstracting it for the purpose of navigation, to the diminution of the stream or the injury of the complainants—or in other words, without bringing in an equal supply, being disclaimed by the defendants; it would be, in my opinion, an indiscreet and injudicious exercise of power in this court to arrest, at this moment, *brevi manu*, the operations of the Company. In the prosecution of this work they have expended among us a large amount of money: they have lately effected a loan, to relieve themselves from embarrassment, and enable them to complete their canal. It is a work in which a portion of the community is deeply interested, and which, if completed and in successful operation, may be of great benefit to the State. To grant an injunction against them now, in the manner and to the extent prayed for, would be at once to prostrate their hopes, and might result in an injury which the power of this court could never repair.

The power of the court to grant injunctions in cases of nuisance will not be questioned. There is a necessity for some preventive remedy, when it is ascertained that great or immediate mischief, or permanent injury, is about to be done to private property; and this is the foundation of the jurisdiction. But the exercise of the power must always rest in the sound discretion of the court, to be governed by the nature of the case.

The case presented is peculiar; but it does not satisfy me of that pressing necessity, or that certainty of mischief, which would authorize an interference in a matter of such magnitude.

The Morris Canal Company are about completing their canal. The great problem, whether their means of supply will afford them a sufficient quantity of water, without causing any diminution of the water in the Passaic at the great falls, and of consequence injuring the complainants, must soon be solved. Important interests are involved in the solution. This court will afford to the Company its protection, so far as may be legally done, until the result shall be ascertained. But the defendants must remember that they proceed upon their own responsibility, and at their peril. If there be any hazard or any danger, it is theirs to encounter and overcome it. The rights of the Society are clear, vested, and prior rights; and the enjoyment of them in their full extent will be secured.

The injunction is refused.

CITED *in Doremus* v. *Dutch Reformed Church*, 2 *Gr. Ch.* 349; *Shields* v. *Arndt*, 3 *Gr. Ch.* 245; *Soc. for Estab. Usef. Manuf.* v. *Low*, 2 *C. E. Gr.* 28; *Carlisle* v. *Cooper*, 6 *C. E. Gr.* 579.

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# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

# STATE OF NEW-JERSEY,

JANUARY TERM, 1831.

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## PETER JACKSON v. T. I. DARCY, E. GOULD, AND P. I. RYERSON.

Where A. obtains judgment against B., before a justice of the peace, without an affidavit, as required by the statute, or a state of demand filed; upon which execution issues, and the goods of B. are sold, and purchased by C., who left them with the defendant for a few days; in which time H., another creditor who had suits depending, also obtains judgment and execution, and by his agent and a constable seizes the same goods in the possession of B.; upon which C., the former purchaser, commences several suits against H., his agent, and the constable; whereupon H. files his bill in this court, to set aside the judgment and execution of A. and sale to C. as fraudulent, and obtains an injunction to stay proceedings on the suits by C.; to which bill A., B. and C. put in their answer, admitting the want of an affidavit according to the statute, and of a state of demand, but denying any fraud or collusion, and showing a bona fide debt and full consideration for the judgment: the charge of fraud is sufficiently answered, and the injunction will be dissolved.

The omission to file a state of demand, might authorize the reversal of the judgment in a proper tribunal, but is no ground for the equitable interference of this court.

If the want of an affidavit is fatal to the judgment, and renders void the execution and sale, so that no title was conveyed to the purchaser as against the complainant, it must be by force of the statute; if so, they are as inoperative in courts of law as in a court of equity, and the decree of this court is not necessary to make manifest the nullity of these proceedings.

As to continuing the injunction on the ground of multiplicity of suits; if the proceedings are vexatious or malicious, and the plaintiff at law fails, he will

be bound to pay costs and liable to an action for a malicious prosecution. It should be a very strong case to induce this court to interfere.

If the right should be established in favor of the defendant at law, and the plaintiff should persist in any oppressive proceedings, this court will promptly interfere.

*Semble.* That the court of chancery will not interfere to restrain proceedings at law, where the law affords an adequate remedy.

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The question in this case arose on a motion made on the part of the defendant, after answer filed, to dissolve an injunction obtained by the complainant, on filing his bill, to restrain Darcy, one of the defendants, from farther prosecuting certain suits against the complainant and others, before a justice of the peace. The facts, as disclosed on the hearing, appear in the opinion of the court.

*J. P. Jackson*, for the complainant.

*P. Dickerson*, for the defendants.

THE CHANCELLOR. It is represented in this case that Gould, being debtor to Jackson to the amount of one hundred and sixty dollars, confessed a fraudulent judgment to *Peter A. Ryerson* for one hundred dollars, before Abram Ryerson, esquire, the brother of the said Peter. That there was no consideration for the judgment, no state of demand filed, and no affidavit made, according to the requirements of the law. That execution was issued at the request of Gould, the defendant, for the purpose of protecting his property; and that while suits were pending on the claim of the complainant, the property was fraudulently and secretly sold, and purchased in for a nominal sum, by *Timothy I. Darcy*, one of the defendants, and the brother-in-law of Ryerson the plaintiff; who left the property with Gould, and never paid the constable for it. That afterwards, the *complainant*, by his agent, one Snow, and a constable, seized the property under executions issued on his judgments. That thereupon Darcy instituted seven suits before justices of the peace, in the county of Morris—some against Snow and the constable, some against the constable, and some against the constable and the complainant. Some of them were instituted by warrant issued

for one hundred dollars, and for which bail had to be given; whereas by the statements of demand filed, it appeared the claims were for amounts under three dollars. In two of them the damages are laid at fifty dollars. All the suits are in trespass, and relate to the taking of the goods under the executions of Jackson.

The bill prays that the judgment, so far as respects the complainant, may be decreed void and inoperative, and the execution and sale thereon fraudulent and void; and that Darcy may be restrained from further prosecuting the said suits, or any other for the same cause, until answer, or the further order of the court.

Answers have been filed by the defendants, and the case is submitted on the question of dissolving the injunction.

In regard to the judgment—the charge of fraud is sufficiently answered. The consideration is fully shown. It was founded on a note of hand, assigned over to P. A. Ryerson by Ava Neal, and is stated by all the defendants to have been a just debt. It is denied also, that there was any collusion in regard to the suing out of the execution, or the sale of the property; or that there was any agreement or secret understanding between Gould and Darcy, about leaving the property in the possession of Gould. The property charged to be worth three hundred dollars, sold at the sale, which is alleged to have been an open one, for about one hundred and eighty or one hundred and ninety dollars. Darcy says the property was not removed immediately because it was stormy, and that the next day after the sale he was called away from home, on urgent business, which detained him three or four days; and before he returned the property had been seized by virtue of the complainant's execution. It is admitted, however, that there was no statement of demand filed when the judgment was confessed; and that there was no affidavit made and filed, as required by the act of assembly in cases of judgments confessed before justices of the peace. The omission to file a statement of demand, might authorize the reversal of the judgment in a proper tribunal, but is no ground for the equitable interference of this court; especially when it is shown that there was a full consideration for the judgment. If the want of an affidavit is fatal to the judgment, and renders void the execution

and sale, so that no title was conveyed to Darcy as against this complainant, as is contended by him, it must be by force of the statute; and if so, the decree of this court is not necessary to declare and make manifest the nullity of the proceedings. They are quite as inoperative in the courts of law without the assistance of a court of equity as with it; and it appears to me there is not only no necessity, but no propriety, in this court expressing any opinion on the proper construction of the act.

So far, then, as regards the irregularity or alleged fraud in the proceedings complained of by the plaintiff, up to the time of the commencement of the several actions by Darcy against the complainant and his agents, I see no ground for the continued interference of this court.

The only question is, whether Darcy shall remain injoined from prosecuting his actions against Jackson, Snow, and Waggoner the constable.

I think there is no reason to doubt that Darcy might have ample justice done him, if injured, without bringing *seven* actions, as it appears, he has done; and I think, too, that in the prosecution of these suits an improper spirit has been manifested. But it may very well be, that more than one or two suits were necessary, not only to try the right, but to obtain the proper compensation, if he was entitled to recover. How far he may have exceeded the bounds of strict propriety in this case, I am not able to determine. It should be a very strong case to induce this court to interfere and settle the question.

If the proceedings are vexatious or malicious, and the plaintiff at law fails in his actions, he will be bound to pay the legal costs and expenses, and will besides this be liable to an action or actions for malicious prosecutions: *Potts* v. *Imlay*, 1 *Southard*, 330.

If the right is clearly established at law in favor of the defendant at law, and the plaintiff should persist in any proceedings that may be oppressive, this court will then very promptly interpose. But as the fraud of this case is denied—it being the foundation, as I take it, of the bill, it is not proper that the injunction should be any longer continued.

Injunction dissolved.

ELIZABETH MEEKER v. JOSEPH MARSH, EXECUTOR OF ELIZABETH BUTLER.

If a plea of matter in bar of the complainant's suit be allowed by the court, and is afterwards proved to be true, the cause is at an end.

A plea to a bill against an executor, for account and payment of a legacy, "that (on such a day) an account in writing was made out and stated, *between the defendant, as executor*, &c. and the *complainant as legatee*, under the will of the testatrix, and upon that account there was a balance still due complainant of thirteen dollars and six cents, which was then and there paid by the defendant to the complainant, who thereupon gave a receipt in full, (setting out the receipt,) and averring that *she read the receipt* herself, or it was truly read to her by the defendant; that she was fully *satisfied with the receipt*, and voluntarily signed it:"—shows with sufficient certainty that the account stated *was between* the defendant *as executor*, and the complainant *as legatee*, &c.; but is defective, because all these allegations may be true, and yet the complainant *may not have been present* when the account was made out and stated, and may *never have seen and examined it*. These matters are material.

The defendant allowed to amend the plea in this case in twenty days, or in default thereof the plea to stand for answer, with liberty to except.

The answer accompanying the plea, expressly denying fraud, and being decidedly in support of the plea, though not *stated* so to be: this formal omission may be supplied if the plea is amended.

An averment in such a plea, that the vouchers have been delivered up, is not necessary; the delivering up of vouchers on the settlement of an account is not essential.

When the bill is *for an account*, it is not required that the plea should set out the account; although this is the proper course when *the account is impeached* by the bill.

When all the allegations of the plea being taken as true, do not make out a full defence; or when necessary facts are to be gathered by inference alone; the plea cannot be sustained.

On Bill and Plea.

This bill is filed by the complainant as a legatee, under the last will of Elizabeth Butler, deceased, (the mother of complainant,) against the defendant as executor of said will, for an account, and payment of what on such accounting may be found due. By the will, one half of the personal estate is bequeathed to the complainant; and the bill charges, that after paying the

debts and expenses, there remains a large balance in the hands of the executor, and that he refuses to come to any account, or to pay over to the complainant her share of said balance. It is further charged, that if any receipt has been given by the complainant for her share, that the same has been fraudulently obtained, and must have been signed by her without reading it, in confidence of the honesty of the defendant, and supposing it to be a receipt for money on account of the said share.

To this bill the defendant has pleaded, substantially, that on the 11th of August, 1826, an account in writing was made out and stated between the defendant as executor, and the complainant as legatee under said will; and upon that account there was a balance still due to complainant of thirteen dollars and six cents, which was then and there paid by the defendant to the complainant, who thereupon gave a receipt in full in the words following:—

"PERTH AMBOY, Aug. 11, 1826. Received of Joseph Marsh, executor of the estate of Elizabeth Butler, deceased, thirteen dollars and six cents, in full for the balance due me on account of said estate. ELIZABETH MEEKER."

The plea then avers that the account is just and true, and that the complainant at the time read the receipt in full, or it was truly read to her by the defendant, and she was satisfied with it, and signed it voluntarily: that the same was bona fide and valid; and the fraudulent and undue procurement of the receipt is expressly denied. The plea is accompanied with an answer apparently in support of the plea, and expressly denying the fraud charged.

*W. Chetwood*, for the defendant. The object of the bill is, simply to obtain an account, and payment of the legacy. It does not set out an account, and charge a mistake: it contemplates a receipt in full having been given, and charges, that if such receipt was given, it was unduly obtained. The answer denies the alleged fraud: this is all that is necessary. It is sufficient in the answer to deny the allegations of the bill.

The matters set out in the plea, must now be taken as true. We come before the court on the sufficiency of the plea. If it is

sufficient, the complainant may still take issue upon it. I take the plea to be sufficient in form and substance, and, if proved, a bar to all the relief sought for under the bill. The plea sets forth, that at a particular time an account was stated between the parties; that a balance was due, which was paid, and a receipt given by the complainant for the balance due on account of said estate; and the receipt is set forth. This I consider all-sufficient. When an account is sought for, an account stated is a good plea in bar, unless the complainant points out specific errors or charges of fraud in the stating of the account: neither of which is done in the present bill: *Wheat. Dig.* 68, *tit. Matter of Account; Coop. E. P.* 277—9; *Mitf. P.* 208; 4 *Cran. R.* 306; 3 *Atk. R.* 399.

*O. S. Halsted*, for the complainant. We do not contend that an account stated is not a bar, when well pleaded: but put ourselves on the ground, that no account of that estate was ever rendered to the complainant. We could not therefore point out particular errors.

We consider the plea in this case defective in form and substance. A plea must aver all the facts necessary to render it a complete equitable defence: *Beam. P. E.* 24. The plea of a stated account should *aver*, that the complainant and defendant did make up, state and settle an account. It must aver, that it was an account of the estate of which an account is sought, and of all matters relating thereto. It must state that the complainant, after examination, approved of the account. It must show that the account was final, and aver that it is just and true: 2 *Newl. C. P.* 132; 2 *Sch. and Lef.* 726; *Beam. P. E.* 230; *Coop. E. P.* 277, *n.* 1.

This plea is a departure from the precedents. It does not allege that it was an account in relation to this estate. There is an allegation that the same account is just and true; but what account, is not stated. It does not state by whom the account was stated; or allege that the complainant ever saw the account. It states that the receipt was read, but not the account. It should have averred that the vouchers were delivered up, although this point, perhaps, is not fully settled: 4 *Price's Ex. R.* 4; *Beam.*

*P. E.* 236. And should not the plea set out the account stated: 1 *Atk. R.* 1; 2 *Sch. and Lef.* 728. If the account was given, the plaintiff might amend his bill; otherwise manifest fraud might be committed. If the plea is allowed we must take issue on it, and if the facts as stated are proved, the suit is at an end: *Beam. P. E.* 325. If, therefore, the subject matter is good, we want the proper facts stated, that we may meet and controvert them. Again, we think that the plea of a simple receipt, not under seal, is not good: that it can only be pleaded as an account, stated with all necessary averments. In these respects we consider the plea deficient.

There are several objections to the form of the answer. When an answer is put in in support of a plea, it must be stated to be made for that purpose: 1 *Turn. P. C.* 23; 2 *Newl. P. C.* 127-8; *Beam. P. E.* 53. This answer purports to be an answer to the residue of the bill only: we insist that the plea ought to be overruled.

*Mr. Chetwood*, in reply. As to the objection taken to the answer:—An answer may be *in support of a plea*, without containing an express allegation to that effect. It is sufficient if, in the answer, the defendant *saves* all benefit of the plea. The answer in this case must be considered in support of the plea, inasmuch as it contains an averment in relation to the manner in which the receipt was obtained, directly applicable to the subject matter of the plea.

If the plea can be sustained upon principle, it need not conform precisely to the precedents: *Beam. P. E.* 231. It is not necessary that the delivering up of vouchers to the party should be averred. It may be proper to aver it when it has taken place; but not otherwise. Neither is the defendant obliged to set out the stated account, or annex it to the plea; save only when the complainant's bill admits that there is such an account, and seeks to impeach it: *Coop. E. P.* 279. This bill is not of that description; it only seeks to obtain an account. I admit that the plea must contain all the facts necessary to constitute an equitable defence. The precedent in *Beam.* is intended to meet a complicated case. This is not such a case. It is the

claim of a single legatee, against the executor, for her legacy under the will: nothing else connected with it, and no other party concerned. The plea meets this case: it sets out that an account was made out and stated *between these parties*, in their respective capacities of executor and legatee; that upon that account there was a balance due the complainant; which was paid, and a receipt given by the complainant in full for the balance due her on account of said estate; and the receipt itself is set out, *in hæc verba*. Nothing could be more explicit than the receipt, which forms part of the plea. Does not the plea, then, contain all the facts necessary to constitute an equitable defence? To me it appears that nothing more could be required.

THE CHANCELLOR. Two questions are raised: 1. Whether the plea is good in form and substance. 2. Whether it is supported by the answer.

On hearing this case, I was inclined to the opinion that the plea was substantially, though not formally correct, and that it should be allowed. Further examination has satisfied me that at least one of the exceptions urged by the complainant's counsel is well taken. The plea is drawn, apparently, without attention to the most approved precedents. Such is the peculiar nature of this kind of pleading in equity, that a court should always be careful to see that it sets forth plainly and explicitly every matter necessary to constitute a complete defence and bar to the complainant's claim. For if the plea be allowed by the court as correctly pleaded, and is afterwards proved, the cause is at an end. The allowance of a plea, says Ld. Redesdale, is as complete a judgment against the claims of the plaintiff, as can be given on the most solemn and deliberate hearing of the cause on the pleadings and proofs, provided the truth of the plea be established by evidence: 2 *Scho. and Lef.* 725, *Roche* v. *Morgell.*

The exception, that the plea does not sufficiently allege that the account stated between the parties was in relation to the claims of the plaintiff as a legatee under the will of Elizabeth Butler, deceased, is not sustainable. The plea alleges that the account stated was "between this defendant, as executor of the said Elizabeth Butler, deceased, and the complainant, as one of the legatees or persons entitled under the said will of Elizabeth

Butler, deceased; and upon that account there was a balance," &c. This is deemed to be sufficiently certain.

Another exception, that the plea does not allege the vouchers to have been delivered up on the settlement, is too fastidious. Where such delivery up has in fact taken place, the averment may very properly be made in a plea of this nature; yet such an averment is not necessary, and for the plain reason, that the delivery up of vouchers on the settlement of an account is not held to be essential: *Mitf.* 211; *Coop. Eq.* 280; *Willis* v. *Jernegan*, 2 *Atk.* 250; *Wharton* v. *May*, 5 *Ves.* 27; *Beam. P. E.* 230, 231.

Nor is it required, when the bill is for an account, that the plea should set out the account. This is the proper course when the account is impeached by the bill: *Mitf.* 211; *Coop.* 279; *Beam's Pleas*, 230.

But the principal objection to the plea is, that it does not state *that the complainant and defendant made up, stated and settled an account in writing; and that the complainant, after examination, approved of said account.* These allegations are to be found in all the precedents, and appear to me important. The plea states, that on the day therein mentioned, "an account in writing was made out and stated between this defendant, as executor of the said Elizabeth Butler, deceased, and the complainant, as one of the legatees or persons entitled under the said will of said Elizabeth Butler, deceased; and upon that account there was a balance still due the complainant of thirteen dollars and six cents, which balance was then and there paid," &c. It further states that the complainant gave a receipt, which she read herself or the same was truly read to her by the defendant; that she was fully satisfied with the receipt, and voluntarily signed it, &c. Now all this may be true, and yet the complainant may not have been present when the account was made out and stated, and may never have seen or examined it. In these particulars, I consider the plea faulty. When all the allegations of the plea, being taken as true, do not make out a full defence, the plea cannot be sustained. These matters appear to me material, and I cannot feel at liberty to allow a plea in which there are such important omissions, or from which necessary facts are to be gathered from inference alone.

But I am not disposed, even on these grounds, to overrule the plea. I feel bound to believe that these omissions are accidental and not intentional, and that they can readily be supplied; and, under this impression, I shall do as was done by Ld. Eldon, in *Bayley* v. *Adams*, 6 *Ves.* 586; and by Ch. Kent, in *Allen* v. *Randolph*, 4 *J. C. R.* 697; allow the defendant to amend his plea in these particulars, if he shall request so to do. The amendment is to be made in twenty days, and a copy furnished the plaintiff's solicitor, free from expense; and in default thereof, the plea is ordered to stand for an answer, with leave to the complainant to except to it.

On the second question, I am of opinion that the answer is decidedly in support of the plea, though not stated so to be. This formal omission may be supplied if the plea is amended.

CITED *in Flagg* v. *Bonnel*, 2 *Stockt.* 86; *Frey* v. *Demarest*, 1 *C. E. Gr.* 239.

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## JACOB MILLER AND NATHAN STIGER v. DAVID WACK AND WIFE, AND OTHERS.

A mortgage given by a guardian to his sureties in the guardianship bond, reciting the bond given to the ordinary, and conditioned "that if the said guardian should and would faithfully comply with the condition of the said bond, by paying over to the minor mentioned in said bond, all the moneys in the hands of the said guardian, as guardian of the said minor, when he arrives at full age, then the said mortgage and bond should cease and be void"—creates no *trust* for the benefit of the minor. The mortgagees are the absolute owners of the mortgage: they have the legal and beneficial interest in it, and have a right to treat it as their own.

A second mortgagee, and those holding under him, are to be charged with *constructive notice*, of a prior mortgage, on record and undischarged, at the time of the execution and recording of the second mortgage.

When a first mortgage is *cancelled on the record*, the legal priority attaches to the second mortgage, unless it should appear that the first mortgage was improperly and fraudulently cancelled, without payment or satisfaction, and without the consent of the first mortgagees or either of them.

The general rule is, that when matter is set up by the defendants in avoidance of the complainant's claim, it must be proved otherwise than by the answer.

When a bond has been casually lost, a party is at liberty to come into this court for discovery, or for discovery and relief. If he comes for discovery only, it is in aid of his common law remedy. If he comes for discovery

and also for relief, it is usual to attach to the bill an affidavit of the loss of the deed.

This affidavit is not required as *evidence of the loss*, but to establish the propriety of this court's exercising *jurisdiction*. If the defendant by his answer does not admit the loss, the complainant is put upon his proof.

The rule in courts of law, is, that a party in a cause alleging the loss of a paper, is competent to prove such loss, for the purpose of letting in secondary evidence of the contents; but the court will be careful that such evidence is confined strictly to the fact of loss.

The oath of the defendant, in his answer, that the mortgage (he sets up) was *taken away and cancelled by the mortgagor fraudulently, and without his consent*, is to the very point in controversy, and does not come within the rule which admits the oath of a party to prove the loss of a paper, for the purpose of letting in secondary evidence of the contents, &c.

The simple *cancellation* of a mortgage on the record, is not an absolute bar, unless there has been actual satisfaction. It is not conclusive evidence; the facts may still be investigated. But it is evidence of a high character, and sufficient to sustain the rights of all persons interested, unless the party setting up the cancelled mortgage shall show satisfactorily, some *accident, mistake,* or *fraud.*

The answer of the defendant is no evidence of the fraudulent abduction of the mortgage: it cannot be admitted to repel the strong presumptive evidence of payment or satisfaction, arising from the cancellation of the mortgage on the record.

It is the province and the duty of this court, to decide upon the facts and the law, except in cases of real difficulty, growing out of contradictory testimony, or opposing facts and circumstances, which it is impossible for the court to reconcile: then an issue is directed to inform the conscience of the court.

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The bill in this case was filed upon two mortgages, given by David Wack and wife, to other persons, by whom they were assigned to the complainants. There was a decree, pro confesso, against David Wack and wife, the mortgagors. The other defendants, Jacob Wack, Aaron Ayres, and Aaron Ayres, jun., by their answer, set up an intermediate mortgage on the same premises, given by David Wack and wife to Aaron Ayres and Jacob Wack. This mortgage sets forth, that David Wack was the guardian of Aaron Ayres, jun.: that he had executed a bond to the ordinary, in the penal sum of two thousand dollars: that the said Aaron Ayres and Jacob Wack were his sureties in the said bond. And the condition of the mortgage was, "now if the said David Wack shall and will faithfully comply with the condition of the said bond, by paying over to Aaron Ayres, jun., the

minor mentioned in said bond, all the moneys in the hands of the said David Wack as guardian of the said Aaron Ayres, jun., when he arrives at full age, without any deduction, &c., then these presents and the said bond shall cease and be void," &c. The mortgage was executed and recorded, subsequent to the complainants' first mortgage, and prior to their second mortgage; and was undischarged at the time of the recording of the complainants' second mortgage, but was cancelled on the record three days afterwards.

The defendants in their answer allege that this mortgage was unduly obtained from Ayron Ayres, sen., who had it in custody, by David Wack, the mortgagor, on pretence that he wanted to look at it, and would bring it back again; and that he fraudulently took it to the clerk's office and had it cancelled on the record, without the consent of the mortgagees, and without payment or satisfaction. And they insist that the cancellation is fraudulent and void, and set up this mortgage as a subsisting lien upon the property, and entitled to priority over the complainants' second mortgage; and whether it was or not, was the question in this case.

The case was argued in January, 1829, and the opinion of the court delivered in April, 1829; in which the Chancellor, declaring "that under the circumstances he could not determine that the mortgage of the defendants had not been cancelled with the consent of the mortgagees," directed an issue to ascertain that fact, if the defendants required it. The defendants elected to take the issue, and gave notice thereof to the complainants' counsel. The complainants obtained an order for re-hearing; and the cause came on for farther argument, and for final hearing and decree. The facts appear in the opinion of the court.

*E. Van Arsdale*, for the complainants.

*N. Saxton*, for the defendants.

THE CHANCELLOR. David Wack, being the owner of ninety-nine acres of land in the county of Warren, mortgaged the same on the 21st May, 1824, to George McCracken, for two hundred

and fifty dollars. This mortgage, having been duly registered on the 24th May, 1824, was on the 27th May, 1825, assigned over by McCracken to John Allen Taylor, for a valuable consideration. On the 12th April, 1825, David Wack mortgaged the ame premises to the said John Allen Taylor, to secure the payment of eight hundred dollars. This last mortgage was registered on the 16th of the same month of April. On the 21st August, 1826, Taylor being the holder of both mortgages, assigned them to the complainants; who now seek to foreclose the equity of redemption and sell the mortgaged premises, to raise the money due them. Aaron Ayres and Jacob Wack are made parties as being subsequent mortgage creditors, and Aaron Ayres, jun. as holding a subsequent judgment.

The bill has been taken, pro confesso, as against the mortgagor. Aaron Ayres, Jacob Wack, and Aaron Ayres, jun. have answered. They set up by their answer, that about the year 1820, David Wack became the guardian of Aaron Ayres, jun., who was then a minor: that he entered into a guardianship bond with Aaron Ayres and Jacob Wack as his securities, in the sum of twelve hundred dollars: that to indemnify them he gave them a mortgage on the premises in question, conditioned for the faithful execution of the trust: that for the accommodation of David Wack, the mortgagor, this mortgage was given up by the mortgagees to be cancelled, and was actually cancelled, and a new mortgage was given on the 22d May, 1824, as a substitute, which was registered on the 24th May, 1824. This second mortgage was placed in the hands of Aaron Ayres, one of the mortgagees; who alleges in the answer, that David Wack, the mortgagor, afterwards came to his house and requested to see the mortgage; that on its being handed to him he refused to give it back, and contrary to the will of the said Aaron Ayres he kept and carried away the mortgage, and afterwards procured it to be cancelled of record. They further say, that David Wack afterwards, on the 11th June, 1825, made a third mortgage to Ayres and Jacob Wack, which he procured to be registered on the 1st day of July, 1826; but that he did not deliver it to the mortgagees, or either of them, until about the time of the recording of the last mortgage, when he met them at Hackettstown and

there offered to them the last mentioned mortgage, which they refused to accept in lieu of the former mortgage; but that Jacob Wack, one of the mortgagees, took possession of it as a farther or collateral security only, and at the same time demanded the former mortgage. David Wack afterwards gave up the former mortgage, cancelled, to Jacob Wack, who delivered it to the said Aaron Ayres, jun. on his becoming of age: and Aaron Ayres, jun. now sets up this mortgage as a subsisting lien on the premises, prior to the second mortgage of the complainants.

The original mortgage given by David Wack to Aaron Ayres and Jacob Wack, does not appear to have been given for the benefit of Aaron Ayres, jun., the minor. He sets up in the answer, that it was upon condition that the money was to be secured by mortgage, that he chose David Wack for his guardian; but the mortgage is evidently taken by the securities of the guardian, for their indemnity. They were liable to the ward by means of the guardianship bond, and their object was to protect themselves from any danger or loss arising from that liability. There is, then, no trust connected with the mortgage. The mortgagees were the absolute owners, having the legal and beneficial interest in it. They treated it as their own, and very properly. The first mortgage was delivered up by them to be cancelled for the accommodation of Wack, who wanted the property cleared to settle some matter of boundary with one of his neighbors. A second mortgage was taken as a substitute, with the same proviso as the first; and they were at liberty to deliver up this security at any time, and for any purpose. This second mortgage came into the possession of the mortgagor, (at what time is not stated,) and on the 19th of April, 1825, was cancelled of record. Prior to this cancellation, viz. on the 12th of April, 1825, the mortgage from David Wack to John Allen Taylor, for eight hundred dollars, was registered. The question is between these two mortgages. The complainants, who hold the Taylor mortgage, insist that the cancellation of the prior mortgage to Wack and Ayres, is a bar to the pretensions of the defendants: that they have the legal priority on the record, and are entitled to retain it in this court. And they further say, that even if the defendants might claim relief on the grounds set ou

in the answer, yet that the the material allegations on which their claim must rest are proved in no other way than by the answer itself, which is not sufficient. On the other hand, it is insisted that the mortgage from David Wack to Aaron Ayres and Jacob Wack, was fraudulently cancelled; that it was neither "redeemed, paid or discharged," in the language of the act; and that the cancellation is no bar to the mortgage, but that the same is an existing lien on the property; and that the material allegations of the answer are sufficiently proved.

The claim of the plaintiffs is manifest from the record, and therefore no time need be spent in canvassing it. The difficulty arises from the matter set up in avoidance of it, in the answer of the defendants. They allege, that at the time of the registry of the Taylor mortgage, there was a prior mortgage on record from Wack to Jacob Wack and Aaron Ayres, which was uncancelled, and of which Taylor had notice. This is certainly true; and although it is attempted to be made out by those holding under Taylor, that he lent his money on the faith of that mortgage being cancelled, it does not so appear in point of fact. If David Wack had the mortgage in his hands at the time, uncancelled, it is strange that it was not cancelled of record before or at the time when the Taylor mortgage was registered. It was not done until three days afterwards; and Taylor, and those holding under him, are to be charged with constructive notice of this prior mortgage. When, however, the mortgage from David Wack to Aaron Ayres and Jacob Wack was cancelled of record, the legal priority attached to the Taylor mortgage, unless the facts are true, as set up by the defendant's answer, that the mortgagor improperly and fraudulently obtained possession of and cancelled the mortgage, without the will and consent of the mortgagees or either of them, and without having made satisfaction or payment. If these facts are proved, another important question may arise as between these parties.

The principle is settled, that when matter is set up in the answer in avoidance of the plaintiff's claim, it must be proved otherwise than by the answer: *Thompson* v. *Lambe*, 7 *Ves.* 587; *Boardman* v. *Jackson*, 2 *Ball & Beatty*, 382; *Beckwith* v. *Butler*, 1 *Wash. Rep.* 224; *Paynes* v. *Coles*, 1 *Munf. Rep.*

373; *Bush* v. *Livingston & Townsend*, 2 *Caine's C. in Error*, 66; 1 *Johns. R.* 580, *Green* v. *Hart;* and *Hart* v. *Ten Eyck*, 2 *J. C. R.* 92.

The first inquiry then is, what evidence has been adduced of the facts stated in the answer by Aaron Ayres—for he is the person who had possession of the mortgage, and the only one of the defendants who has any knowledge of the manner in which it was procured by David Wack. There have been three witnesses examined, but neither of them speaks on this subject. It was contended that, inasmuch as the object for which the mortgage was taken was not yet accomplished, the mortgagees would not voluntarily have yielded their security. This raises a presumption in their favor, but it is a mere presumption. They might have supposed themselves safe enough without it; and the fact that, according to their own statement, they rested quietly for a whole year at least, after the mortgage was withdrawn, shows that such withdrawal did not occasion much alarm and anxiety. After a careful examination of the whole case, I am unable to find any evidence to sustain the facts charged in the answer, nor do I think that the circumstances are such as to justify any proper conclusion in favor of their truth.

But it is contended by the defendants, that the general rule, as above stated, does not apply to this case: that this is one of those cases in which the oath of the party shall be received, *ex necessitate rei*, and to prevent him from being deprived of his rights. There is a class of decisions which authorizes the introduction of the oath of a party, and makes it *quasi* evidence to a certain extent; and it becomes important to inquire into the principle of those decisions, and whether the case now before the court will fall within it.

Where a bond has been casually lost, a party is at liberty to come into this court for discovery, or for discovery and relief. If he comes for discovery merely, it is in aid of his common law remedy, which is a well settled head of equity jurisdiction. If he comes for discovery and also for relief, it is usual to attach to the bill an affidavit of the loss of the deed. This affidavit is not required as evidence of the loss, but to establish the propriety of this court's exercising jurisdiction. If the defendant, by his an-

swer, does not admit the loss, the plaintiff is put upon his proof: *East India Co.* v. *Boddam*, 9 *Ves.* 466. And this is the general doctrine of the court with respect to lost papers, on which the plaintiff seeks to recover. The object of the affidavit was, originally, to give jurisdiction to the court; and therefore it is laid down by a late writer, that if the defendant should not by confession supply the want of evidence of the deed, the plaintiff must, in order to obtain this court's interference, prove to its satisfaction by other means, the original existence, and the loss or casual destruction thereof, and the purport of its contents: *Jer. Eq. Juris.* 359–60. This would seem to be confining the rule within narrower limits than is now done in courts of law. The rule as now settled at law is, that a party in a cause alleging the loss of a paper, is competent to prove such loss, for the purpose of letting in secondary evidence of the contents. But as it is a sound maxim that a party is never allowed to be a witness in his own cause, the court will always take care that such testimony is confined strictly to the fact of the loss, which is merely auxiliary to the trial, and does not involve the matter in controversy. The testimony, says Chief Justice Marshall, in *Taylor* v. *Riggs*, 1 *Peters*, 597, which establishes the loss of a paper, is adduced to the court, and does not relate to the contents of the paper, nor affect the issue to be tried by the jury. It may be important, as letting the party in to prove the justice of the cause, but does not itself prove any thing in the cause. But admitting the rule to be the same in law and equity, (and I know not why they should differ,) that the oath of a party is received as a foundation for secondary evidence to prove the contents of a lost instrument, does it affect the case now before the court? The object here is not to make use of the defendant's oath for the purpose of introducing secondary evidence, and thereby get at the purport of the mortgage; for the mortgage itself is before the court, and on production the contents of it are manifest. The object is, by that oath, to prove the fact that the mortgage was fraudulently taken away by David Wack. Now that is the very point in controversy, and it is perfectly plain that if the defendant's oath can be considered as testimony, he proves by it every thing necessary to enable him to recover; or at all events imposes on the opposite

party the burden of showing that he came honestly and fairly by the paper. He proves by it an important fact in the cause, going to affect the issue; which according to the doctrine of Chief Justice Marshall, cannot be done by the oath of the party. It appears to me, then, that the case now before the court is not at all within the principle of the authorities referred to; and if this is to be considered as an exception from the general rule of evidence, that matters charged in the answer not responsive to the bill, are to be proved, it must be on some other ground.

I am aware there is one case to be found which seems to give countenance to the principle contended for by the defendants' counsel. It is that of *Atkin* v. *Farr*, 1 *Atk.* 287, decided by Ld. Hardwicke. There was a bill filed for the delivery of a bond which had been given to the defendant to read, who took it, and against the consent of the owner, put it in his pocket and went away with it. The defendant admitted the execution of the bond, but set up that it was delivered voluntarily; and the question was, whether the plaintiff had proved his case. The Ld. Chancellor says, "though the proof of the bond's being forced from her is by one witness only, it is no objection in this case, for the plaintiff herself was entitled to make oath of the loss of the bond, and that it was thus taken from her; and as this fact is proved by the oath of one witness against the oath of the defendant in his answer, *and as there is likewise proof of the defendant's offering to execute a new bond; that is a circumstance supporting the evidence of this single witness, sufficient to take it out of the general rule.*" I do not understand that in this case the oath of the party was ever called for, much less that it was relied on by the court. It would have been regular, as we have already seen, to annex to the bill an affidavit of the loss of the bond. It does not appear that even this was done in that instance, and the case was certainly proved without it. I do not feel satisfied to take this dictum of the learned chancellor in its length and breadth, as full authority, unsupported as it appears to be by any other decision, and contrary to the settled principles and policy of the law.

But it is insisted that the oath of the injured party is sufficient, *in odium spoliatoris*, to charge the wrong doer; and it is at-

tempted to bring this case under that rule. The only case cited of any kind of authority, is that of *Childerns* v. *Saxby*, 1 *Vern.* 207. There an execution had been taken out contrary to an injunction of the court of chancery, and the defendant in the execution complained that the bailiff who served the execution had taken from a certain hiding-place in the house one hundred and fifty pounds in money, and done great spoil to his goods. The Ld. Chancellor ordered that the bailiff should make good this money, "and should satisfy all other damage which the defendant should swear he had sustained." The matter afterwards came on before the lord keeper King, and it was insisted that this order was most unjust; for that the most this court would do was to put the parties accused to purge themselves upon oath; but by the order of the chancellor, the defendant was to be the judge of his own damage. But the lord keeper held the order just, and said, he thought it an idle practice in the court, to put a thief to his oath to accuse himself; for he that has stolen will not stick to forswear it, and therefore, *in odium spoliatoris*, the oath of the party injured should be a good charge upon him that has done the wrong, and confirmed the order.

I apprehend that a court of equity, at the present day, is under no very binding obligation to consider the doctrine of that case as sound law, or wholesome justice. I do not find that the precedent has been followed, and I am not willing to adopt it as the practice of this court. But without speculating further on the correctness of the decision, it will be a sufficient answer to say, that its object was merely personal. It was strictly *in odium spoliatoris*, and to operate upon him *who had done the wrong*. The case before the court is altogether different. Here the oath of the party is to have no effect against the wrong-doer. It is to operate exclusively against third persons, strangers to the transaction, having legal and vested rights; and those rights are to be seriously affected, if not destroyed by it.

Upon this view of the subject, I am fully of the opinion that the charge of the fraudulent abduction of the mortgage is not proved, and that the answer of the defendant in that behalf is no evidence of the fact.

But there is another ground taken by the defendants, which it

is insisted on is sufficient to sustain the priority of their mortgage. They say, there is full proof that the mortgage once existed, and full proof of the contents of the mortgage. They say further, that by the act of the legislature it is enacted (*Rev. Laws*, 464) "that when any registered mortgage shall be redeemed, paid and discharged, it shall be the duty of said clerk, on application made to him by the mortgagor, or person redeeming, paying and discharging the said mortgage, and producing to him the said mortgage cancelled, or a receipt thereon signed by the mortgagee, or his executors, administrators or assigns, to enter in a margin to be left for that purpose opposite to the said abstract, a minute of the said redemption, payment and discharge; which minute shall be a full and absolute bar and discharge of the said entry, registry and mortgage." And they then contend that the fact of the possession and cancellation of the mortgage is not to be taken as evidence of the legal satisfaction and discharge of the mortgage; that this must still be proved by the person who holds the priority on the record, as against him who sets up and claims under such cancelled instrument. I do not consider this to be the sound construction of that act; and it appears to me that a more dangerous one could not well be given to it. Of what use would the cancellation of the record be, if the mortgagee might at any time afterwards set up the cancelled mortgage, prove its original existence and contents, and then call upon the mortgagor or a purchaser, or subsequent mortgage or judgment creditor, to prove the fact of the lawful payment and satisfaction of the mortgage.

The clerk acts, and must act, upon the simple production of the mortgage with the seals torn off, or the mortgagee's receipt endorsed. He has no judicial power; he is not required to examine witnesses as to the fact of payment; and it is therefore true that the simple cancellation is not an absolute bar unless there has been actual satisfaction. It is not conclusive evidence. The facts may be investigated in a proper way. Nevertheless it is evidence, and evidence too of a very high character, and sufficient to sustain the rights of all persons interested, unless the party setting up the cancelled mortgage shall show some accident, mistake or fraud; and this must be shown satisfactorily on his part. If not so shown, the cancellation is conclusive proof of the

payment, more especially in favor of third persons, who have a right to look to the record for protection.

But it is said, if any presumption may arise from the fact of the mortgage having been in the possession of the mortgagor and cancelled by him, the answer, that is the oath of the party, may be received to repel such presumption, and to prove the fraudulent manner in which he obtained it. This does but bring up the question already discussed in another shape. If the answer can be admitted to repel the strong presumptive evidence arising from the cancellation of the mortgage, then the party's own oath to a fact alleged in his answer not responsive to the bill, will be made evidence in the cause, and may be sufficient to support his claim. This, I think, cannot be.

This case comes before the court at this time on an order for further argument as to the expediency of directing an issue, at the request of Aaron Ayres, jun., one of the said defendants, to ascertain whether the mortgage given to Jacob Wack and Aaron Ayres, was or was not cancelled with the consent of the said mortgagees, or one of them. To determine this, it was necessary for me to look into the whole case; and the view taken of it renders the expense of an issue unnecessary. It is the province and the duty of this court, to decide upon the facts and the law, except in cases of real difficulty, growing out of contradictory testimony; or opposing facts and circumstances, which it is impossible for the court to reconcile. Then the issue is properly directed, to inform the conscience of the court: *Le Guen* v. *Gouverneur & Kemble*, 1 *Johns. Cases*, 436; 6 *Johns. C. R.* 255. I consider that the defendants in this case have failed to make out the facts necessary to support their claim, as against the complainants; and being clearly of that opinion, I do not feel authorized to order an issue.

I much regret the necessity which impels me to differ from the opinion heretofore delivered in this cause. If a decree had passed in conformity with that opinion, the habitual respect I have always entertained for the decisions of this court, would have induced me to hesitate long, before I could have been brought to disturb it. But as the whole case is open, and has been thrown upon me, I must pronounce, though with great diffidence, my

own judgment, and not that of another. And under these circumstances it affords me pleasure, that if the law is not now correctly dispensed, there is another and higher tribunal, where the errors of this court may be speedily corrected, and the law of the land finally settled.

I am of opinion that the complainant is entitled to a decree for the amount of his two mortgages, with costs.

CITED *in Trenton Banking Co.* v. *Woodruff*, 1 *Gr. Ch.* 126, 130, 132; *Stevens, Ex'r*, v. *Post*, 1 *Beas.* 411; *Black* v. *Shreve*, 2 *Beas.* 478; *Banta* v. *Vreeland*, 2 *McCar.* 107; *Freeholders of Middlesex* v. *Thomas*, 5 *C. E. Gr.* 42; *Harrison's Adm'r* v. *Johnson*, 3 *C. E. Gr.* 429–434; *Dudley* v. *Bergen*, 8 *C. E. Gr.* 400.

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## STARK ET AL. v. HUNTON ET AL.

At common law, and independent of our statute, it is a settled rule at this day, that express words of exclusion are not necessary in a will in order to bar dower; it is sufficient if there be a manifest and unequivocal intention.

This intent must be so plain as to admit of no reasonable doubt. The claim of dower must be inconsistent with the will, or so repugnant to its provisions as to disturb and defeat them.

If the intent be doubtful or ambiguous, the legal title of the widow will prevail.

In the following devise: "I give, devise and bequeath unto my wife Jane all my tavern house and lot where I now live, together with all the furniture and stock in the same; to have and to hold to my said wife Jane during her natural life, provided she remains my widow: but in case she should marry again, then it is my will that my said tavern house and lot and premises be disposed of *according to law*:" the manifest intent of the testator is, that it should be in lieu of dower, at least in the premises so devised.

The acts of the widow while in possession, treating the property as her own, altering and improving the property to enhance the annual value, leasing it out for a number of years, reserving rent to herself; are consistent only with the fact, that she considered herself as holding under the will, and amount to an acceptance of the devise.

The widow having married again, her estate is defeated; she cannot afterwards claim her dower, and the devised premises must go, according to the directions of the will, to those lawfully entitled; that is, to the children of the testator, and those representing them.

The object of the statute of the 24th February, 1820, (*Rev. L.* 677,) was to compel the widow, in all cases where land had been devised to her, to elect between the bounty of her husband and her legal rights, and to prevent her enjoying both By the just and reasonable construction of this act it extends to all lands and real estate embraced in the will of the testator.

The intent of the act is, that the widow should not be entitled to dower in any

lands devised by will, where, under the same will, she took an interest in land or real estate as devisee.

How far the statute may apply to after acquired lands, or other real estate of which the testator may be considered as dying intestate, *query*.

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Benjamin Weller, late of Paterson, in the county of Essex, died in June, 1823, leaving a last will and testament, which was duly proved by Jane Weller, his widow, and Philemon Dickerson, executors in the said will named. The will directed that all debts and expenses should be paid out of the personal estate, and such real estate as was for that purpose designated in the will. Then followed this devise: "I give, devise and bequeath unto my wife Jane, all my tavern house and lot where I now live, together with all the furniture and stock in the same: to have and to hold to my said wife Jane during her natural life, provided she remains my widow; but in case she should marry again, then it is my will that my said tavern house and lot and furniture *be disposed of according to law.*" The testator left several children. The personal property and the real estate, except what was given to the widow, were sold, and the proceeds applied to the payment of debts. The widow, after her husband's death, remained in the tavern house, occupying and enjoying it, "together with all the furniture and stock in the same," according to the terms of the will. She converted the lower part of the tavern house into stores, and leased them for five years to sundry persons, reserving rent to herself, to the amount of about six hundred dollars. In November, 1828, she married George Hunton, with whom she lived on the premises devised to her, at the filing of the bill. The complainants, some of whom are children, and other representatives of children of the testator, seek to have the will established, and the real estate divided or sold, that each one entitled may enjoy his share.

*E. Van Arsdale, jun.*, for the complainants. The only questions are, as to the devise to the widow—whether she has accepted the devise, and whether it is a bar to her claim of dower?

1. The bill charges that she did accept it: in her answer she denies that she accepted it in lieu of dower, or that her keeping possession of the premises bars her dower. An acceptance may

be inferred from circumstances: 3 *Bro. C. C.* 88; 1 *Eden*, 489; 1 *Swans. R.* 382. The doctrine of *election* applies to dower. The acts of the widow amount to an acceptance of the devise. She has always, since her husband's death, retained possession of the property and furniture. She occupied it several years as a tavern and boarding house, then made alterations in the property, rented out the house, and had the lower part converted into stores, which she had rented to four different persons, at an annual rent of near six hundred dollars. The leases are made by her individually, and rents reserved to her, and she has received the rent until she was injoined. She appeared to be acting for herself, and much to her own interest. It is too late for her now to say she has not accepted the devise.

2. Was this devise intended to be in lieu of dower?—There are no express words to this effect in the will. The property is given to her during widowhood. No express words are necessary in a will to bar dower: it depends on the intention of the testator and circumstances of the case: 2 *Scho. and Lef.* 449; 2 *Mad. C. P.* 57. The testator had but a small real estate beside what he devised to the widow, and that he ordered to be sold for the payment of debts; this shows that he did not intend his wife to have dower. His other property was not sufficient to pay the debts. He gave his wife all the furniture, which was the greatest part of the personal estate. In short, he gave her all his property left, after paying the debts, during widowhood. He could not have intended her to have dower too. I conclude, therefore, that the intention is manifest on the face of the will, that the property devised to her should be in lieu and in bar of dower.

But if she is entitled to any dower at all, she cannot claim dower in the tavern house devised to her. She cannot take the same property in two capacities: 2 *Eden*, 256. She cannot take as devisee and dowress under the same will: 2 *Mad. C.* 48; 1 *Swanst. R.* 370. She could not, before her second marriage, have held two thirds of the tavern house as devisee, and the other one third as dowress: *Coop. R. C.* 320. By electing to take as devisee, she forfeits her right as dowress. I contend that she did elect to take as devisee: 1 *Swanst.* 394, *n.*; 2 *Scho. and Lef.* 444. And having accepted the devise, she cannot now renounce

it and say she will have her dower; it is too late: 1 *Swanst. R.* 372; 3 *Atk.* 607.

3. But if there is any doubt upon common law principles, I think the question is settled by our statute, *Rev. L.* 677, *s.* 1; which enacts, that a devise of real estate to the wife is a bar to dower, unless she dissents, in writing, in a limited time: she has not done so in this case. Upon her second marriage the property was to be disposed of according to law. I take this to mean, it should go to his children as they might be entitled.

*P. Dickerson*, for the defendant. Weller died in 1823, leaving seven children. The wife retained possession of the premises and kept the family together. The leases made by her were for her own use. After the marriage, the executor sold the personal property, which she had forfeited by the marriage; and the question is, whether she is entitled to dower in the real estate, or any part of it. We contend she is entitled to dower at common law. The general doctrine is, where a devise is made to a widow, she will also be entitled to her dower, unless the holding both will be inconsistent. Her right of dower is independent of her husband; if he gives her any thing it will be considered additional. The doctrine of *election* cannot apply, except where both cannot be held. This is not such a case. She had a right to hold the possession precisely as she did, as a dowress, until dower was assigned her. If our statute did not exist, there could be no question in this case: she would be entitled to dower. We contend, that our statute only applies to cases where there is a devise over, upon the second marriage of the widow. In this case, there is no devise over: it is not within the statute. The statute can have no effect upon the construction of this will.

The intention of the testator, that she should at all events have her dower in this property, is manifest upon the face of the will. He gives the property to her during widowhood: he could not have intended to strip her of all property upon her second marriage. She had all the children to bring up and educate, and therefore he intended to make a liberal provision for her. It is a sound rule of construction, that effect is to be given to every part of an instrument; but by the construction contended for on the

other side, the last clause of the will must be rendered useless, or its meaning perverted. Why were the words "to be disposed of according to law," inserted, unless something definite was meant? And what is the import of those words? The obvious meaning of this clause is, that upon her second marriage the provision of the will should cease to operate upon this property; that it should be disposed of, not according to the will, but according to law in case no disposition by will had been made, or he had died intestate: that is, one third to the widow, and the other two thirds to the children. The testator intended, that in case she married, she should still have what the law would have given her, her dower in the premises, and if she did not, that she should have the whole property.

*I. H. Williamson*, for defendants. The general principle is, that the widow is always entitled to both the property devised and her dower, unless precluded by express words, or manifest intention. It is not necessary that it should appear that both *were* intended. If there is any ambiguity, or want of evidence of intent, the rule is in favor of the widow.

It was at one time held, that to bar dower *express words* were necessary: 2 *Ves. jr.* 580; 2 *Dick.* 835. Since that time it has been held, that express words are not necessary; but the intention must be clear and undoubted, or else the widow takes dower. The two claims must be clearly inconsistent, so that she cannot take both without defeating some part of the will. The case in 2 *Scho. and Lef.* 444, recognizes these principles, and shows what is meant by clear and manifest implication or intention. It must be beyond doubt: if there be doubt or ambiguity the widow shall have dower. She was excluded in that case because the devise was repugnant to her claim of dower. In *French* v. *Davis*, 2 *Ves. jr.* 572, the question was, whether the will was inconsistent and irreconcilable with the claim of dower. In the case before the court, there is nothing in the will to manifest the intention of the testator that the wife should be deprived of dower.

The widow is not barred of her dower because she has had part of the estate devised to her, or because the other part of the estate is devised to others. The devise to others is always taken

subject to incumbrances, of which dower is one. Nor is she barred because the land devised to her is more valuable than her dower: 8 *Vin. Ab. tit. Devise*, 366, *pl.* 45; 2 *Eq. Ca. Ab.* 353, *Lemon* v. *Lemon; Prec. in Ch.* 133, *Hitchin* v. *Hitchin;* 2 *Atk.* 427. These cases govern the one now before the court.

The widow may claim by two titles; *one third* as *dowress*, and *two thirds* as *devisee:* her doing so is not inconsistent with the will: *Rop. on H. and wife*, 559.

This is not a case of election. Independent of the statute, there are cases where the widow may be put to elect; but to establish an election, it must be shown that she *intended* to make her election, and that she *understood her rights:* neither of which appear. Without intention there can be no election, and the widow is not bound to elect until the situation of the estate is known, and she is able to determine which is most beneficial for her. The right of election may continue till the whole estate is wound up and closed, if it was fifty years: *Wake* v. *Wake*, 1 *Ves. jr.* 335; 3 *Bro. C. C.* 255. Acts done in ignorance, do not amount to an election, nor acts of mere ownership, consistent with her claim either as dowress or devisee. On general principles, the widow would be clearly entitled to dower.

If there is any doubt in the case, it arises on the statute. What is the true construction of this act? We contend that it operates only in favor of devisees; that it extends only to lands devised to other persons, or devised over, after the interest of the widow ceases. The widow may recover against purchasers, her dower in lands conveyed by the husband. The statute extends only to lands *devised* by the husband. Suppose the husband dies intestate as to part of his real estate, is the widow barred of her dower in these lands? Now we insist, that as to the property in question here, the husband died intestate; that the claim of the children is as heirs at law, and not as devisees. The court are called on to *extend* the construction of this act, or this case cannot be brought within it. This estate is not devised over after the marriage: the language of the will is, that the property is to be disposed of *according to law.* What law, but the law disposing of the real estate of persons dying intestate? And does not the law provide for the widow as well as the children? Can the chil-

dren claim as devisees? There is no devise to them. Must they not claim as heirs at law? Does not this very clause confirm and make manifest the claim of the widow? She claims according to law, as well as the heirs. Her right is equal to theirs: both are legal rights, and together cover the whole estate. But it is said that there has been a *forfeiture*. Whence this idea? A forfeiture can only arise from an unlawful act, as committing waste, &c. The determination of the estate here was on the occurrence of a particular event, which the policy of the law does not, and the husband had no right to prohibit. The meaning of the will is, that in case of a second marriage the *husband's bounty* should be withdrawn; but the *legal rights* remain. After that event, the law, and not the will, was to regulate the rights of all parties interested. We insist, the widow is entitled to dower. The bill is for an account of the personal estate, and also the rents and profits of the real estate since the marriage. We insist, the widow is not bound to account for the rents and profits. As dowress, she was entitled to retain the possession, and to receive the rents and profits of this property until dower assigned her: *Rev. L.* 397. She did not receive the rents and profits of the two thirds, as receiver for the children. If, however, she is accountable, she is entitled to allowance for maintaining the children.

*Th. Frelinghuysen*, in reply. We insist, 1. That the widow is not entitled to dower at common law: 2. That there is nothing in the will to save her right; and, 3. That the statute is a bar. It is to be observed that the whole of the real estate, except the tavern house in question, has gone for the payment of debts. All our inquiries are as to this one devise. It is admitted that no express words are necessary in the will to bar dower; that a manifest intent is sufficient, and that it may be inferred from *circumstances*. In the time of Lord Camden, he was struck with the inconsistency of contrary claims by the widow. It is said that, on this point, Ld. Camden has been overruled. The subject has been equitized on, by Mr. Roper and others. They have drawn distinctions between a *real* and a *mixed* fund, that have gone to destroy *principle*. The case in 2 *Ves. jr.* 572,

is *sui generis*, arising out of particular circumstances, and not a safe precedent. Ld. Redesdale lays down the safe rule in 2 *Sch. and Lef.* 449.

Can any one doubt as to the intention of the testator? He intended his wife should take under the will, and according to the will, not part as dowress and part as devisee. She cannot do an act under the devisee without conflicting with her dower right. We find her leasing and receiving rent. Suppose she now undertakes to assert her dower right in these very premises, and institutes a suit, in what situation would she stand? We contend, that the right she acquired under the will has been accepted and enjoyed by her; and she cannot now come back and claim her dower. She has elected, and is bound by it. Here we are met by general principles, without any particular case to sustain them. The case in *Swanst. R.* shows what will amount to an acceptance of the devise. Will ignorance avail her? Did she not know the nature of the property? Every widow knows that she is entitled to dower in the lands of her husband. She could not have been ignorant of this, or of the extent of the devise. The dower was one third, the devise was of the whole property. She had only to choose between *one third* and *the whole*. We say she has done so, and is to be fixed with the election; that this is to be inferred from the circumstances.

There is nothing in the will to save her right upon second marriage. The property was given to her during widowhood. She has by her own act defeated the devise to her. The testator intended, no doubt, that his wife should have an inducement to remain single and bring up the family, and not bring a stranger to their government. He did not intend, that if she would marry, and relinquish the bounty, she should come in as dowress and take one third of the land; for the property, in case of marriage, was to be disposed of according to the *law of the case.*

But what does the *law of the land* say? Our statute of 1820, intended to bar, unless the wife dissents, in all cases. Now we admit there is a chasm in the statute, as to after acquired lands; but where the will covers the whole estate, there the statute is peremptory. The statute says, the wife shall not be entitled to dower in any lands or real estate *devised by her said husband,*

unless she expresses her dissent in writing, &c. Can we suppose that the legislature intended to bar her dower in *other lands*, and yet leave her dower *in the lands devised to her?* This land was devised to her, and is therefore precisely within the statute. She takes the equivalent intended by the legislature, and yet it is said that now she may take the dower itself. I submit that the wife is not entitled to dower.

As to the rents and profits, she must account for them from the marriage. By the statute, the widow is to remain in and enjoy the property until dower assigned; but it does not in that case, mean that she is to alter the property and change its nature and character. In doing this the court may assume she was a trespasser, her acts are *waste*, and in strictness she has forfeited all right to dower. She is accountable on any ground from the time of her marriage. As to compensation for bringing up the children, it ought not to be allowed; guardians should have been appointed; the widow should not be permitted to swallow up the inheritance in this way.

THE CHANCELLOR. The important inquiry in the case is, whether the former widow, now Mrs. Hunton, is entitled to dower in the tavern house and lot devised to her by the will of her former husband, Benjamin Weller.

On the part of the complainants it is insisted, that the devise in the will was intended to be in lieu of dower, and was accepted by the widow; and that having by her second marriage forfeited the bounty of her first husband, she cannot now turn round and claim dower in the very property which she took and held as a devisee under the will. While on the other hand, the converse of these propositions is contended for as true, on the part of the defendants.

Considering this case as at common law, and independent of our statute, the two questions that present themselves are, 1. Did the testator intend the devise to be in lieu of dower? and, 2. Did the widow accept of the devise?

Notwithstanding some cases to the contrary, I think it may be laid down as a settled rule at the present day, that express words of exclusion are not necessary in a will, in order to bar dower. It

is sufficient if there be a manifest and unequivocal intention. This intention must be so plain as to admit of no reasonable doubt. If it be doubtful or ambiguous, the legal right of the widow will prevail. See the case of *Birmingham* v. *Kirwan*, 2 *Sch. and Lef.* 444, and the authorities there cited.

Where there are no express words of exclusion, as in the case now before the court, the intention of the testator is to be gathered from circumstances. No general rule can be adopted which will properly or safely apply to the great variety of cases that are from time to time occurring in the community. That which approaches nearest to such rule, is the principle already adverted to, that the intention must be so plain as not to admit of reasonable doubt. The claim of dower must be inconsistent with the will, or so repugnant to its provisions as to disturb and defeat them. This principle runs through all the cases, from that of *Lawrence* v. *Lawrence*, 2 *Vern.* 365, to the latest of the English decisions, and has been adopted by the most learned judicial tribunals of our country. To review the authorities in detail is not necessary for my present purpose, and might well be looked on as an affectation of learning. They were lately reviewed with great clearness by Chancellor Kent, in the case of *Adsit* v. *Adsit*, 4 *Johns. C. R.* 448. The result from the whole was, that where there are no express words of exclusion, the intention to exclude must be beyond reasonable doubt. And in a late work, coming over the subject of dower, the same principle is recognized: 4 *Kent's Com.* 57.

The question then recurs, Did the testator intend the devise to be in lieu of dower, in the premises thus devised to his wife?

The provisions of the will are very brief and simple. He appropriates all his real and personal property, save the tavern house with the furniture and stock belonging to it, to the payment of debts. The tavern house with the furniture and stock he gives to his wife during her natural life, provided she remains his widow. Or in other words, he gives to her all his clear estate after the payment of debts, subject to be defeated by her subsequent marriage. He left five children, all under age—the youngest an infant. It would seem that he placed great confidence in his wife, who was the mother of those children. He

placed under her exclusive control all his earthly substance, relying on her affection and prudence to take care of and deal justly with their common offspring. He seems to have anticipated the future marriage of his wife as an event rather possible than probable; and provides that in case she should marry, the devise should be considered at an end, and the property be disposed of according to law.

I think the manifest intention of the testator was, that the devise to the wife should be in lieu of her dower, at least in the premises thus devised. He never intended that she should hold one third part of this tavern house as dowress, and the remaining two thirds as devisee. It was one property, not susceptible of convenient division. The devise was of the whole; and the object was one entire object, the benefit of his wife and children. Some of the English cases have been liberal in support of the widow's claim for dower; but I do not find one that goes so far as to maintain, that where certain property is given to a wife, during her widowhood, that she is also entitled to claim dower out of that same property. The two claims are inconsistent, and cannot stand together. In the case before the court, the devise to the wife is different in its nature and consequences from her legal right to dower; and I do not see how the two claims could be exercised as to the same property, at one and the same time. In the case of *Birmingham* v. *Kirwan*, already cited, Ld. Redesdale ruled that a devise to the wife for life of certain lands and a house, with directions to keep it in repair, was inconsistent with the assertion of a right of dower *in the same lands;* and she was accordingly put to her election. And the same doctrine is held by Sir Thomas Plumer, the vice chancellor of England, in the later case of *Dorchester* v. *Effingham*, *Coop. Eq. Rep.* 319. On this question, whether where the whole of the lands are devised to the wife, she may take two thirds of them as a devisee under the will, and the remaining one third under her title to dower, there are some ingenious remarks in 1 *Roper on Husband and Wife*, 561; and the author seems to conclude that the wife may take in both capacities in the same property. But I am not satisfied with the reasoning of the author. The policy of the great mass of the English cases appears to have

been, to save the dower of the widow if possible; and for this purpose, numberless refinements and distinctions have been resorted to by the courts. Our policy, as manifested by our statute, is different; and I am not disposed to run counter to it, and give to this will a construction which I think it will not justly bear.

2. Upon the question of acceptance, I incline to think that the case is with the complainants. The widow has treated the property as her own in every respect. She has altered and improved it. She has leased it out for several years, to a number of persons, reserving rent to herself. She has advisedly taken measures to enhance the annual value of the property, evidently for her own benefit. I should consider this an acceptance of the provision under the will and according to the terms of the will, and binding upon the widow, unless it could be shown that she had mistaken her rights, or was not properly apprised of them. There is nothing in the case to induce such a belief. The idea thrown out, that as widow she was entitled to remain in the mansion house, free of rent, until dower was assigned her, and that, *in favorem dotis*, she may be considered as remaining in under that provision of our statute, and not as taking under the will, cannot be entertained. Her acts while in possession were directly repugnant to such a pretension, and are consistent only with the fact, that she considered herself as holding under the will, and therefore, the property as her own freehold.

Looking at this case, therefore, on common law principles merely, I am of opinion that it was plainly the intention of the testator to exclude the widow from dower in the premises; and that the devise, intended to be in lieu of dower, was accepted by the widow in conformity with such intention; and that, having defeated her own rights by the subsequent marriage, she cannot now claim her dower; and consequently, that the property will go over, according to the directions of the will, to those who are lawfully entitled—by which, I understand, the children of the testator, or those representing them.

But there is another view of this case, which it is important to consider. The difficulties experienced by our courts of justice in

the construction of wills, and in ascertaining and settling the rights of parties, where the widow claimed as devisee and dowress, and the increasing uncertainties consequent thereupon, induced the legislature to interpose, and establish some plain rule, which might be not only simple in its terms, but definite in its results. By the act of 24th February, 1820, entitled, a supplement to the act relative to dower, it is enacted, "that if a husband shall hereafter devise to his wife, by a will duly executed to pass real estate, any lands or real estate, for her life or otherwise, and without expressing whether such devise to her is intended to be in lieu or bar of dower, or not, and the said wife shall survive her said husband, that then the said wife so surviving, shall not be entitled to dower in any lands or real estate devised by her said husband, unless she shall in writing express her dissent to receive the lands or real estate so devised to her, in satisfaction and bar of her right of dower in the other lands and real estate devised in and by the said will, and file the same with the surrogate of the county wherein she resides, or in which the lands or real estate devised to her shall be situated, within six months after the probate of the said will; and then and in that case she shall be considered as renouncing the benefit of the said devise to her."

It is admitted that if this case fall within the provisions of this statute, the question is at an end; for it is not pretended that any dissent in writing was filed by the widow, pursuant to the act. The statute is not free from ambiguities, nor is it as extensive in its application as was, perhaps, originally intended: but it appears to the court to admit of a just and rational construction, and that in such construction the present case is fairly embraced. The evil that existed was one generally understood, and has already been adverted to. The object of the statute was to remedy the evil, and to compel the widow, in all cases where any lands or real estate had been devised to her, to elect between the bounty of her husband and her legal rights, and to prevent her from enjoying both; and I am of opinion that the object of the statute is fully answered, so far as it concerns all lands and real estate embraced in the will of a testator. How far the statute may apply to after acquired lands, or other real estate, of which

the testator may be considered as dying intestate, may be a question: but that question cannot arise here; for the whole real property is devised, either to the wife or to the executors for the payment of debts.

It was argued, that, from the terms of the act, it was intended to operate only in favor of devisees of "*other lands* and real estate devised in and by the said will;" and that it was not intended to bar the dower in the lands devised to the widow herself; or at all events that the act does not necessarily call for such a construction; and that it should be construed strictly, inasmuch as it goes to take away a legal right. But the act not only uses the expression "*other* lands and real estate devised in and by said will," but it expressly says, that the widow shall not be entitled to dower in *any* lands or real estate devised by her said husband, "unless she shall dissent in writing as aforesaid." There is certainly an ambiguity in the act; but taking the whole together, I think the intention of the legislature is manifest, that the widow should not be entitled to her dower in *any* of the lands devised by a will, where, under the same will, she took an interest in lands or real estate as a devisee; and such a construction appears to me to comport best with the words of the act. I am therefore of opinion that, under the provisions of our statute, the defendant, Mrs. Hunton, can have no claim for dower in the lands devised to her, and which she has lost by her second marriage.

Hunton and wife must account for the rents and profits since the marriage, and an allowance must be made to them for the maintenance of the children during the same period. Let such an account be taken, together with a general account of the debts and credits of the estate, if need be, and let report be made by the master as to the practicability of making partition of the property among those lawfully entitled. The question of costs, and all further directions, are reserved.

CITED *in Norris* v. *Clark*, 2 *Stockt.* 54; *English* v. *Ex'rs of English*, 2 *Gr. Ch.* 509; *Bruen* v. *Brogaw*, 3 *Gr. Ch.* 265; *Colgate's Ex'rs* v. *Colgate*, 6 *C. E. Gr.* 380; *White* v. *White*, 1 *Harr.* 202; *Van Arsdale* v. *Van Arsdale*, 2 *Dutch.* 418.

AUGUSTUS F. CAMMANN v. DAVID P. TRAPHAGAN, EXECUTOR OF HENRY D. TRAPHAGAN.

[Same case *antè*, 28.]

Upon a bill filed, and injunction allowed, to restrain proceedings at law, and a plea of a judgment recovered; upon which issue was joined and proofs taken in support of the plea:—The facts of the plea appearing to be proved, the injunction was dissolved, and the bill dismissed with costs.

Although in the record of a judgment adduced in support of a plea, it appears that there was a verdict and judgment rendered upon the trial of an issue in fact, without an issue at law, upon demurrer joined in the case being disposed of, and that there was a blank left in the judgment for the amount of the taxed costs:—These errors and irregularities are to be corrected in some direct proceeding, and are not subject to exception when the proceedings are collaterally drawn in question.

Upon dissolving the injunction and dismissing the bill; the costs ordered to be paid out of the moneys deposited in court, and the remainder of the deposit ordered to be paid to the defendant on his judgment at law.

This cause came on to be heard upon the bill, the plea of a judgment recovered at law, replication and proofs taken in support of the plea, before E. Van Arsdale, the master called to advise the Chancellor, &c., and was submitted on written briefs, by

*C. L. Hardenbergh*, for the complainant;

*G. Wood*, for the defendant.

The master reported the following opinion, which at this term was delivered by the Chancellor:—

This cause having been again submitted by the chancellor to the undersigned, one of the masters of the court, to advise what decree ought to be made; and having read the pleadings, orders, proofs, exhibits and depositions made and taken in this cause, and considered the same; the master begs leave to state, that the facts of the defendant's plea are proved. He however considers it proper to mention, that upon examining the record of the judgment pleaded, it appears, that the declaration contains three counts; the two first are founded upon two promissory

notes to which the defendant demurred, and the third count is for money lent, goods sold, &c., to which the defendant pleads non assumpsit, and adds a similiter. The plaintiff joins in demurrer: then follows the award of the venire, the finding of the jury for the plaintiff, and the assessment of damages; the issue in law not appearing to be otherwise disposed of. There are also blanks in the judgment of the court, which appear to have been left for the purpose of being filled up with the taxed costs. These errors and irregularities, the master considers, are to be corrected by some direct proceeding, and are not subject to exception when the proceedings are collaterally drawn in question: 2 *Peters*, 163.

The master would therefore advise your excellency to decree that the injunction heretofore issued in this cause be dissolved; that the complainant's bill be dismissed out of this court, with costs to be taxed, to be paid out of the moneys deposited in court in this cause by the complainant; and the residue of the moneys so deposited be paid to the defendant in this suit, for and towards the damages, interest and costs recovered by him at law upon the judgment in his said plea set forth; and that the said defendant be at liberty to proceed at law as he shall be advised, for the recovery of any balance that may remain due to him, after crediting the payment ordered to be made as aforesaid.

All which is respectfully submitted.

ELIAS VAN ARSDALE,
Master in Chancery.

20th January, 1831.

## WASHINGTON SKILLMAN AND WIFE v. WILLIAM TEEPLE AND OTHERS.

A second mortgagee, having also a judgment, execution and levy on the mortgaged premises for the same debt; and being security for the mortgagor on two notes to a third person; receiving from the mortgagor a sum of money equal to the amount then due on the notes; and giving him a receipt for the money, "to be credited on the judgment, provided the debtor should indemnify him on his surety for said debtor to the holder of these notes," with a parol understanding "that the money received was not to be considered a payment by the debtor on the judgment until he should pay the amount due on these notes to the holder,"—is entitled to hold his mortgage, judgment, execution and levy, as security for the payment of all the money due to him thereon, and also upon the notes on which he is security; and this lien is perfect against the mortgagor, and all persons claiming under him by subsequent incumbrance or conveyance.

By this payment, receipt and agreement, the holder of these notes acquired an interest in this second mortgage, judgment and execution, and a lien upon the mortgaged premises for the payment of the notes, prior to any other incumbrance excepting the first mortgage, which interest a court of equity will protect.

The holder of these notes (having this security for their payment, comprised in the same lien with the debt to the mortgagee, to wit, the mortgage, judgment and execution; and the mortgagee being also debtor to the holder, as security on these notes) is entitled to have the whole amount due on the notes paid out of the mortgaged premises, and to have it paid next after satisfaction of the first mortgage, although the premises should fall short of paying the whole amount due on the second mortgage, judgment and execution.

The mortgagor having afterwards given a third mortgage on the same premises, and subsequently assigned all his property, including the mortgaged premises, to the third mortgagee and another person, for the benefit of his creditors, this third mortgage and the assignment are subject to the previous liens, and cannot disturb the equitable right of the holder of these notes to have them first satisfied out of the mortgaged premises.

The second mortgagee having afterwards assigned his mortgage, judgment and execution to the third mortgagee, an agreement was entered into between the holder of these notes, a female, and the third mortgagee, that she would release the second mortgagee from his liability on the notes, on condition that the second mortgage should be held by the assignee for her use, as security for what was due her on the notes, to be paid *after* the amount paid by him for the second mortgage, and what was due him on the third mortgage were fully satisfied; and a release was executed by her in consequence of this agreement: this agreement and release are without any consideration;

the only ostensible one, to wit, that she should have a lien on the mortgaged premises after the third mortgage, was delusive, she being entitled to the priority: and her being induced to give up the personal security on the notes, and take a place in the list of incumbrances on the mortgaged premises, posterior to that to which she was entitled, evinced such ignorance, mistake and misapprehension of her right, that the agreement should be set aside and held void.

Although this be a case of mere mistake, this court should find no impediment to correcting it. Equity, in rescinding contracts, does not confine itself to cases of fraud; cases of plain mistake or misapprehension of right, though not the effect of fraud or contrivance, are likewise entitled to the interposition of the court.

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William Teeple, on the 29th April, 1809, mortgaged his farm, of one hundred and fifty-nine acres, in Somerset, to Joanna Dumont, to secure payment of two hundred and fifty dollars. On the 1st April, 1816, he sold and conveyed the premises to Isaac Cooper; who gave him a mortgage on the premises to secure the payment of two bonds for two instalments of the purchase money. In June, 1817, a judgment was entered in favor of Teeple, against Cooper, in the common pleas of Somerset, on one of the bonds, for one thousand six hundred and seventy-seven dollars, the balance then due on the mortgage; on which execution was issued and returned to April term, 1818, levied on the mortgaged premises. Teeple in this time had become surety for Cooper in two sealed bills or notes given by him to George Vannest, together amounting to five hundred and sixty-one dollars. Vannest died, having bequeathed these two notes to Ann Stilwell. Teeple removed to the state of New-York, and appointed Andrew Howell his attorney to collect this debt of Cooper. On the 11th May, 1818, Howell received five hundred and sixty-one dollars of Cooper, and gave him a receipt for that sum, "to be credited on the above judgment and execution, provided the said Cooper shall indemnify the said Teeple on his surety for said Cooper to Geo. Vannest for the same amount." There was a verbal understanding, also, "that this should not be considered a payment on the mortgage, until Cooper had paid to Vannest the amount of the notes." On the 1st May, 1819, Isaac Cooper mortgaged the same premises to John Frelinghuysen, as the committee or guardian of Jacob Cooper, an idiot, and agent for Mary Cooper, widow; and John Baird, as guardian of the children of

Abraham Cooper, deceased: to secure, 1. A bond to John Frelinghuysen in three thousand dollars, conditioned for the maintenance of Jacob Cooper, the idiot; and 2. The payment of a sealed bill to John Baird, guardian, &c., for seven hundred and sixty dollars. Isaac Cooper afterwards failed, and on the 12th May, 1821, assigned all his estate, real and personal, (including the mortgaged premises,) to the said John Frelinghuysen and Thomas A. Hartwell, for the benefit of his creditors. On the 31st September, 1821, Ann Stilwell exhibited to the said assignees her demand on the said notes, for a dividend. On the 1st May, 1822, it was agreed in writing, between Andrew Howell, the attorney of Teeple, and John Frelinghuysen, as guardian, &c., among other things, "that said Frelinghuysen, in behalf of his ward, should pay the funds of said idiot in his hands, to obtain the priority of said Teeple's incumbrances on the mortgaged premises, and the attorney of Teeple should transfer the said mortgage and judgment to Frelinghuysen; that the premises might be disposed of to satify the incumbrances, in the following order: 1. The amount due on the mortgage to Mrs. Dumont; 2. The sum due in behalf of said Jacob Cooper; 3. The sum due J. Baird, guardian of the children of Abraham Cooper; and 4. The debt due the estate of George Vannest, deceased, now Ann Stilwell's, &c.; said Frelinghuysen agreeing that said bond and mortgage should be held by him for the use of Ann Stilwell, for the payment of her debt, after the other claims were fully satisfied, on condition that she release the security, William Teeple, therefrom; and if she would not release, to hold said mortgage as Teeple's security." Ann Stilwell, upon being advised by Frelinghuysen and Howell that it was for her interest to assent, by a writing under her hand, "agreed to the above arrangement, and released Teeple, as the surety of Cooper, by reason of the payment of her debt to be made, as stated, after the claims of Mrs. Dumont, Jacob Cooper, and John Baird as guardian," &c. After this agreement, Ann Stilwell delivered up the notes to Howell, who sent them to Teeple, and as his attorney assigned the mortgage, judgment, &c. of Teeple against Cooper, to said Frelinghuysen. The assignees of Isaac Cooper offered the premises for sale, but not being able to dispose of the

farm to advantage, it was bid in by Howell, by the direction of Frelinghuysen, for the amount of said Frelinghuysen and Baird's demands. Ann Stilwell intermarried with Washington Skillman, and they filed the present bill against the defendants to set aside her agreement and release, and to set up and establish the priority of her claim for the payment of the amount due on the notes, under the mortgage and judgment of Teeple.

The defendants, Frelinghuysen and Howell, answered. Witnesses were examined and the cause heard, on the pleadings and proofs, before George K. Drake, esquire, one of the masters of this court, called to advise the chancellor, who had been of counsel with one of the parties. The cause was argued by

*G. Wood*, for complainants;

*T. Frelinghuysen*, for defendants.

At this term the following opinion was delivered by the court:

DRAKE, master. In this case it appears that the defendant, William Teeple, on the 29th day of April, A. D. 1809, was seized in fee simple of a certain farm or tract of land, situate in the county of Somerset, and state of New-Jersey, containing, by estimation, one hundred and fifty-nine acres and sixteen hundredths of an acre, which is particularly described in the complainants' bill of complaint; and, being so seized, did, on the same day, execute a mortgage in fee, on the said tract of land, to the defendant, Joanna Dumont, to secure to her the payment of the sum of two hundred and fifty dollars, or thereabouts; which said indenture of mortgage was, on the 8th day of May, A. D. 1809, duly recorded in the clerk's office of the said county of Somerset.

It further appears, that one Isaac Cooper, of the county of Somerset, and the said William Teeple, on or about the 5th day of May, A. D. 1817, executed and delivered to one George Vannest, their sealed bill, or promissory note, (it is not ascertained which,) bearing date that day, for two hundred and sixty dollars, payable with interest from date; and on or about the 8th day of May, A. D. 1818, they executed and delivered to said Vannest

their other sealed bill, or promissory note, bearing date on that day, for the further sum of three hundred dollars, payable with interest from date: which said Vannest shortly afterwards departed this life; and by virtue of his last will and testament, the said Ann Skillman, the complainant, (then Ann Stilwell,) became entitled to the said securities, so executed to George Vannest, as aforesaid, and to receive the moneys due, and to become due, thereon. And that the said Ann afterwards, to wit, on the 31st day of December, A. D. 1821, claimed from the assignees of said Cooper, as due to her upon the said securities, the principal sums aforesaid, together with interest from the 1st day of May, A. D. 1819.

It further appears, that the said William Teeple, on or about the 1st day of April, A. D. 1816, by deed bearing date that day, sold and conveyed the said farm or tract of land, to the said Isaac Cooper, for the sum of five thousand three hundred and forty-three dollars and ninety-nine cents; part of which was paid at the time, and to secure the residue, that is, the sum of three thousand five hundred and sixty-two dollars and sixty-six cents, to the said William Teeple, the said Isaac executed to him his two several bonds, conditioned for the payment of that sum, and, together with his wife, executed and delivered to the said Teeple their indenture of mortgage on the same tract of land and premises, bearing date the same day; which mortgage was duly recorded in the Somerset county registry of mortgages, on the 4th day of May, A. D. 1816. And that afterwards, to wit, on the 14th day of June, A. D. 1817, the debt intended to be secured by said mortgage not having been wholly paid, a judgment was entered in the inferior court of common pleas of the county of Somerset aforesaid, in favor of the said William Teeple, against the said Isaac Cooper, for the sum of one thousand six hundred and seventy-seven dollars and seventy-one cents debt, and four dollars and twenty-one cents costs of suit—the balance then remaining due on the said bonds; on which judgment a writ of fieri facias de bonis et terris was issued, returnable to the term of April, A. D. 1818; by virtue of which, the sheriff of the said county duly levied on the said mortgaged premises, together with other property of the defendant.

It further appears, that the said William Teeple, on the 7th

day of May, A. D. 1817, having removed to the county of Seneca, in the state of New-York, by his letter of attorney, bearing date that day, duly sealed and executed by him, constituted and appointed the defendant, Andrew Howell, his true and lawful attorney, and duly authorized him, among other things, to collect all debts and demands due to him from the said Isaac Cooper, and every other person, and to sue for, receive, compound and agree for, and make acquittances for the same; and to do all other lawful acts in the premises as fully as he himself could do, if personally present. Which trust the said Andrew Howell took upon himself to execute and perform; and in pursuance thereof, on the 8th day of May, A. D. 1818, received from the said Isaac Cooper the sum of five hundred and sixty-one dollars, and gave to said Cooper a receipt for the same, in the words and figures following, to wit:—

"SOMERSET PLEAS.

"William Teeple,
vs.
"Isaac Cooper. } In debt, fi. fa.

"Received, May 11th, 1818, of Isaac Cooper, the defendant, five hundred and sixty-one dollars, to be credited on the above action, provided the said Cooper shall indemnify the said William Teeple on his surety for said Isaac to George Vannest for the same amount, on the first day of this May instant.

"A. HOWELL, Att'y fact
"$561. for Plaintiff."

Which receipt (as stated in the answer of Andrew Howell) included the two sums of money got of Vannest, to wit, two hundred and sixty-one dollars got the 5th May, 1817, and three hundred dollars got the 8th day of May, 1818.

It further appears, that afterwards, to wit, on the first day of May, A. D. 1819, the said Isaac Cooper and Susannah his wife executed their mortgage in fee, bearing date that day, on the same tract of land and premises, to the said John Frelinghuysen, (as guardian of Jacob Cooper, an idiot, and agent for the widow Maria Cooper,) and the said defendant, John Baird, (as guardian of the children of Abraham Cooper, deceased,) to secure, in the first place, to the said John Frelinghuysen, a certain

"bond of indemnity given and executed by Isaac Cooper, for securing the maintenance and support of Jacob Cooper, in the sum of three thousand dollars, to John Frelinghuysen, guardian of said idiot; and also to secure, after said bond of indemnity, the payment of a certain sealed bill to John Baird, guardian of the children of Abraham Cooper, deceased, in the sum of seven hundred and sixty dollars: bond of indemnity bearing even date with said mortgage—sealed bill dated January 13th, 1815:"—which mortgage was duly recorded, on the 15th day of May, 1819, in the Somerset county registry of mortgages. And that afterwards, to wit, on the 12th day of May, A. D. 1821, the said Isaac Cooper and Susannah his wife assigned and conveyed to the said John Frelinghuysen and Thomas A. Hartwell, esquires, all their real and personal estate, including the mortgaged premises, *in trust*, to pay the debts of said Cooper. And that the said complainant, then Ann Stilwell, on the 31st day of December, A. D. 1821, exhibited her demands, founded on the securities so as aforesaid given to George Vannest, for a dividend, to the said Frelinghuysen and Hartwell, assignees as aforesaid.

And it further appears, that on or about the 1st day of May, 1822, the said Andrew Howell as attorney in fact for the said William Teeple, and the said John Frelinghuysen, as guardian of Jacob Cooper, entered into an agreement in writing, in the words and figures following, to wit:—

"Somerset Pleas.

"William Teeple, vs. "Isaac Cooper. } Judgment and execution in sheriff's hands, levy made. Sum due May 1st, 1822, $1749.65.

"Whereas William Teeple hath the prior incumbrance on the real and personal estate of said Cooper, now assigned to Thomas A. Hartwell and John Frelinghuysen, as above stated, and no sale of said estate real can be made to satisfy the amount; and John Frelinghuysen, guardian of Jacob Cooper, an idiot, and John Baird, guardian of the children of Abraham Cooper, dec'd, now hold an after mortgage on said real estate; and an agreement having been this day made between said guardians and Andrew Howell, attorney for William Teeple, that the said John Frelinghuysen shall pay, in behalf of said idiot, the funds in his

hands of said idiot, to obtain the priority of said Teeple's incumbrance on said premises, to satisfy his and said Baird's mortgage, according to its tenor. And the said attorney of William Teeple to transfer the bond and mortgage of said Teeple to him the said John Frelinghuysen, guardian for said idiot; that he may, by reason of said transfer, first secure the sum due in behalf of said idiot, then the sum due John Baird, guardian of children of Abraham Cooper, deceased, and then the sum of six hundred and seventy-eight dollars and eighty-one cents, principal and interest of a debt due estate of George Vannest, dec'd, now Ann Stilwell—said Teeple having held said debt in above judgment, according to a conditional writing with Cooper the defendant, by reason of his being surety therefor. Now as said transfer of said mortgage, bond and judgment hath been made, I, J. Frelinghuysen, agree to effect the payments aforesaid, at the death of Jacob Cooper, so far forth as the said estate will admit; if not before done by said Isaac Cooper by any payments he may be enabled to make, or by any sale that said Cooper's assignees may make to satisfy said sums aforesaid. And further, in consideration of said transfer, I, John Frelinghuysen, agree that said bond and mortgage shall be held by J. Frelinghuysen for the use of Ann Stilwell, for the payment of her demand, to take effect after the several sums of said idiot and children of Abraham Cooper are fully satisfied, upon condition that she release the security, Wm. Teeple, therefrom; and if she will not release, to hold said mortgage as Teeple's security. A certain mortgage given to Joanna Dumont, the first incumbrance, before omitted, is considered to be paid in the first instance.

"May 1st, 1822. "JOHN FRELINGHUYSEN,
Guardian of Jacob Cooper.
"A. HOWELL, Att'y
fact for Wm. Teeple.

"To pay Widow Dumont $365.91, May, 1822.
" Jacob Cooper, support.
" Jno. Baird, guardian, $760 and int.
" Ann Stilwell, $678.81, May, 1822."

Annexed to which agreement is the following, entered into and signed by the said Ann Stilwell, to wit:—

"I agree to the foregoing settlement, and do release William Teeple, the security for Isaac Cooper, by reason of my payment to be made as stated, after widow Dumont, Jacob Cooper's support, John Baird, as guardian, &c., and then my debt to be paid.

"May 16th, 1822. "ANN STILWELL.

"Witness,—JOHN M. SCHENCK."

Which several agreements, although bearing different dates, appear to have been finally entered into and executed at the same time, and in the month of May, 1822; after which, the said Ann Stilwell delivered the said two notes, or sealed bills, executed by said Teeple and Cooper to George Vannest, as aforesaid, to the said Andrew Howell, attorney in fact as aforesaid, who soon afterwards sent them to the said William Teeple in the state of New-York. And the said bonds and mortgage given by Cooper to Teeple, as aforesaid, and the judgment confessed thereon, were thereupon, in pursuance of said agreement, transferred and delivered over to the said John Frelinghuysen.

And it further appears, that the said Frelinghuysen and Hartwell, as assignees as aforesaid, soon after the making of the said agreements, advertised the said mortgaged premises for sale at public auction, and after repeated attempts to sell, and adjournments for want of buyers, the same were finally struck off to Andrew Howell, for the amount then due to the said Frelinghuysen and Baird, guardians aforesaid—the said Howell having bid at the instance of the said John Frelinghuysen; who in his answer filed in this cause saith, that it was not struck off "with a view to hold the same for said sum, but that the said Ann, or any other creditor of the said Isaac, might, if they wished, take the property at the bid of said Howell; and that the same hath been repeatedly offered to the said Ann by this defendant, and who hath ever been, and still is, willing to do the same; that no deed as yet has been made to the said Howell for said farm, but the same has remained in the possession of said Isaac Cooper, who keeps said idiot; and the proceeds of the said farm, not even keeping out of the same any part for necessary repairs or expenses, have by this defendant been applied to the payment of the mortgage of the said Joanna Dumont, that being the first incumbrance."

The foregoing facts are fully proved and established by the bill, answers, proofs and exhibits in this cause; and the complainant, Ann Stilwell, on the ground of the foregoing facts, and others set forth in her bill of complaint, charges and insists that by virtue thereof, and especially of the payment of the sum of five hundred and sixty-one dollars by the said Isaac Cooper to Andrew Howell, attorney in fact for William Teeple, in manner aforesaid, and the agreement of the parties at that time, and the receipt given for the same, she became entitled to an interest in the said judgment and mortgage, and to a lien upon the said mortgaged premises, to have the notes or bills so given to George Vannest, and bequeathed to her as aforesaid, secured and paid out of the same, prior to any other incumbrance except the previous mortgage of Joanna Dumont, before mentioned; and that she was mistaken and deceived in entering into the agreement so made and signed by her as aforesaid, dated the 16th day of May, 1822, and that she did the same under mistake, misapprehension, and misrepresentation of her rights; and prayed for relief in the premises.

With respect to her lien on the mortgaged premises, it appears by the testimony of Aaron Longstreet, esquire, that at the time that the money was procured from George Vannest, Teeple was not willing to be security, unless "it was to be considered as no payment on the part of Cooper until the money was afterwards actually paid by Cooper to Vannest;" and it was so agreed. Andrew Howell's answer is in accordance with this; and the receipt then drawn, concluded, and proves the arrangement. After the receipt of this money, Teeple still held his bonds and mortgage, judgment, execution, and levy on the mortgaged premises, as a security for the payment of all that was due to him, and also the notes or obligations given to Vannest. And this lien was perfect, not only against Cooper, but against all persons claiming under him—all having notice thereof, by the public nature of the securities in his hands, and no person being able to claim that the amount of the lien so spread upon the public records should be reduced by any payments, except according to the fair agreement of the parties. Teeple was under no obligations to give an absolute credit on the bonds and mortgage, or judgment

and execution, and neither he nor his attorney in fact had any thing to fear from the threats of the assignees of Cooper. Teeple having then in fact obtained these securities, that these notes or obligations of Vannest (now belonging to the complainants) should be satisfied, the complainant, Ann Stilwell, acquired an interest in that security, which a court of equity will enforce. This doctrine is fully recognized in the case of *Moses* v. *Murgatroyd*, 1 *John. C. C.* 129. The chancellor says, "The plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security, given by their principal debtor to his surety; and the case of *Maure* v. *Harrison*, 1 *Eq. Ab.* 93, is directly to this point. These collateral securities are, in fact, trusts created for the better protection of the debt, and it is the duty of the court to see that they fulfill their design. And whether the plaintiffs were apprized at the time of the creation of this security, is not material. The trust was created for their benefit, or for the better security of their debt, and when it came to their knowledge they were entitled to affirm the trust and to enforce its performance. This was the principle assumed in the case of *Wilson* v. *Blight*, 1 *Johns. C.* 205." See also, 2 *Johns. C. R.* 422.

The complainant, Ann Stilwell, then, at that time became entitled to have her demand of five hundred and sixty-one dollars paid out of the mortgaged premises, and her's became the first entitled to be paid after the mortgage to Joanna Dumont. It was comprised in the same lien with that of her debtor, William Teeple; and if it should turn out that the property is not sufficient to pay the whole lien, there could be no propriety in this court ordering the complainant to share, in any proportion whatever, with William Teeple, and put her to a suit against him in the state of New-York, or his agent here, to recover the money back again. She is entitled to her whole demand, from the property or from Teeple; and if the property is appropriated to pay the debt, he cannot complain, even if it should fall short of paying his demand.

Teeple had, before this time, removed out of this state into the western part of the state of New-York; and Cooper afterwards, to wit, on the 1st day of May, 1819, mortgaged the premises to Frelinghuysen and Baird, as aforesaid; and on the 12th

day of May, 1821, assigned the mortgaged premises and other property to Frelinghuysen and Hartwell, in trust, for the payment of debts. This mortgage and this assignment were, of course, both subject to the previous liens, and could not disturb the equitable claim of the complainant to be first satisfied for her debt out of the mortgaged premises.

Under such circumstances, the parties came together, on the 16th day of May, 1822, and the agreements before stated were entered into.

The first obvious circumstance about this agreement is, that on the part of the complainant, it was entered into without any consideration. The only apparent one, to wit, that she should have a lien on the mortgaged premises after those stated in the agreement, was delusive. The assignees had no right to prefer her to the general creditors, unless the property came into their hands subject to a lien in her favor; and if subject to it at all, it must have had a preferable place to that assigned her by the agreement. So she was induced to give up the personal security of Teeple, merely to take a posterior place in the list of incumbrances. This evinces at least *ignorance* and *mistake* of *her rights*. She charges that it was done under the fraudulent representations, advice and persuasion of Andrew Howell and John Frelinghuysen. This is denied by them. Howell, in his answer, admits that in answer to some inquiries of the complainant, respecting the recovery of her claim from Teeple, in the state of New York, he told her that said "Teeple was apprised of her intention so to proceed, and that he had prepared himself for such an event, by giving or making a judgment to his own honest creditors in the county of Tompkins, state of New York, for an amount equal to the full and fair value of his property, and that he had received that information from the said William Teeple." John M. Schenck, who is the witness to the agreement, and who is alleged by the defendants to have attended, when it was made, as the friend and adviser of Ann Stilwell, testifies, that "Mr. Frelinghuysen wrote to him, and requested him to bring Ann Stilwell, the complainant, there, on that day; and witness took her there agreeably to Mr. Frelinghuysen's request." At this meeting, "Ann Stilwell was advised by Judge Howell to give up her

claim against Teeple, and to come into an arrangement which was then prepared. Mr. Frelinghuysen stated, if witness recollects right, that he thought by Ann Stillwell's doing this, that is, coming into this arrangement, it would be best for her. Judge Howell said to her, that if she were his own daughter he would advise her to do it. Mr. Frelinghuysen said, witness thinks, that if she would come into the arrangement after the idiot's money, he would be able to secure her by a sale of the property of Isaac Cooper. Witness was not acting as agent for Ann Stilwell; he merely brought her down pursuant to the request of Mr. Frelinghuysen."

Nicholas Stilwell, (the father of the complainant,) testified that in June, 1824, Mr. Frelinghuysen told witness that "if Ann, the complainant, had not fell in with them in this agreement, she never would have received any thing; that it was his advice to her to do so, and he would have done so had it been his own child. He stated his reasons," &c.

Aaron Longstreet, esquire, testified, among other things, that he was in company with Howell and Frelinghuysen, when a conversation took place about this business, and Howell stated some reasons, "why he had advised Ann Stilwell to close in with the settlement before spoken of, and that he saw nothing in the way to prevent Ann Stilwell recovering her money yet. After this conversation, old Mr. Stilwell said, I cannot see how it comes that Ann Stilwell is placed last in all this business. Mr. Frelinghuysen answered, because she never was first."

It would appear from this testimony that the defendants, Andrew Howell and John Frelinghuysen, went further in advising and persuading Ann Stilwell to enter into this arrangement, than they now recollect to have done, and from their standing in society, knowledge of the law, and general acquaintance with business, she would be apt to be influenced by their opinions; and there are good grounds from this evidence, and the other circumstances of the case, to believe that she *was influenced* by their advice to make the arrangement which she did; and which would prove to be totally destructive of her claims, if binding upon her. This court has, in many cases, gone far in establishing a fraud from the want or *inadequacy of consideration.*

"Even when standing *alone*, if the inadequacy of the consideration be so strong, gross and manifest, that it must be impossible to state it to a man of common sense without an exclamation at the inequality of it; a court of equity will consider it a sufficient *proof* of fraud to set aside the purchase." "If there be such inadequacy as to show that the person did not understand the bargain he made, or that he was so oppressed that he was glad to make it knowing its inadequacy, it will show a command over him which may amount to fraud." *Newland on Contracts*, 359; 1 *Bro. C. C.* 9.

The defendants say that they acted conscientiously. It is not necessary that they should have acted *intentionally* wrong. They were acting as trustees for third persons, and there is reason to believe, from the evidence, that in their desire to prevent any loss being sustained by their respective *cestuis que trust*, they were too intent upon making an arrangement with the complainant favorable to their interests, and lost sight too much of hers. It cannot be supposed that they had, at that time, a full apprehension of the nature of her claim, or could have anticipated all the effects of the arrangement, as connected with lapse of time and depreciation of property, upon her interests; for they would not, with that knowledge, have taken any part in bringing about an arrangement so prejudicial to her. Yet when the circumstances of this case are considered in connection with the superior discernment, knowledge and influence of the defendants over the complainant, and their consequent obligations to a cautious, discreet and proper exercise of their influence, I am of opinion that if this be a case of mere *mistake*, this court should not find any impediment to the correction of it, arising out of the possibility, that it may expose the defendants to inconvenience or loss. And "Equity, in rescinding contracts, does not confine itself to cases of fraud. Cases likewise of plain *mistake*, or *misapprehension*, though not the effect of *fraud* or contrivance, are entitled to the interference of this court." *Newland on Contracts*, 432; 2 *Ves.* 126; 1 *Vernon*, 32; 1 *Mosely*, 364.

In this case, there can be no doubt that the complainant, Ann Stilwell, acted under a mistake and misapprehension of her

rights. Under such mistake, she signed a parol agreement without any consideration, highly prejudicial to her interests. I am of opinion that that agreement should be set aside, and held void.

It is charged in the bill, that the sale of the mortgaged premises to Andrew Howell, was colorable, and that the premises were not bought by him in his own right, and for his own use, but for the ultimate benefit of the said John Frelinghuysen and Thomas A. Hartwell, or one of them. To this charge there is no answer made by Andrew Howell; and John Frelinghuysen, in his answer heretofore quoted, in substance admits that it was for the benefit of the creditors, and also admits his willingness still to consider it a trust for their benefit. I am of opinion that this sale should be set aside and considered void; and that this honorable court should decree accordingly.

GEORGE K. DRAKE,
Master in Chancery.

MINUTES FOR DECREE.

1. It appearing that the defendants, John Baird and Joanna Dumont, have been duly served with process of subpœna to answer, but have not appeared, plead, answered or demurred; and that the defendants, William Teeple and Thomas A. Hartwell, have appeared, but have not plead, answered or demurred, to the complainants' bill of complaint: as to them, let the bill of complaint be taken as confessed.

2. That the agreement bearing date the 16th day of May, 1822, between Ann Stilwell, and John Frelinghuysen and Andrew Howell, and also their agreement entered into at the same time, be set aside and made void.

3. That the amount due to the complainants on their two notes or obligations, so given to George Vannest as aforesaid, be and remain a lien on the said mortgaged premises, to be first paid next after the bond and mortgage so given to Joanna Dumont, as aforesaid.

4. That the said William Teeple restore and deliver back to the said complainants the two sealed bills or promissory notes so delivered over by Ann Stilwell to Andrew Howell, as aforesaid,

and account to her for the principal and interest due on the same, and pay the same to her accordingly.

5. That the sale of the mortgaged premises, made by the assignees of Cooper to Andrew Howell, as aforesaid, be set aside, made void, and for nothing holden.

6. That a sale of the said mortgaged premises be made under the direction of ——— ———, one of the masters of this court, and the proceeds thereof paid into court, to be appropriated as it shall direct; and that the said William Teeple, Andrew Howell, John Frelinghuysen, and Thomas A. Hartwell, make all necessary releases and conveyances, to convey to the purchaser a good title in the same.

7. That the complainants pay their own costs, but no costs to the defendants.

GEORGE K. DRAKE,
Master in Chancery.

CITED *in Deare* v. *Carr*, 2 *Gr. Ch.* 519; *Firmstone* v. *De Camp*, 2 *C. E. Gr.* 315; *Hampton* v. *Nicholson*, 8 *C. E. Gr.* 427.

# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

# STATE OF NEW-JERSEY,

APRIL TERM, 1831.

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## JACOB S. VANNESS v. SIMON VANNESS.

Upon a bill filed in this court by a purchaser at sheriff's sale, showing that the judgment under which he purchased was entered in the minutes, but not recorded, and the execution was erroneously described in the deed; the sheriff's deed may be reformed. But whether the judgment could be supplied, or the defendant injoined from taking advantage of the want of it, in a proceeding at law, *query*.

Where the purchase at the sheriff's sale was made at the request, or with the consent of defendant in execution, and for his benefit, upon an express agreement, that he should be at liberty to redeem; and complainant was to hold such interest under the sheriff's deed as would indemnify him for the money advanced; and the one intended to give, and the other to receive, a valid security; although it turns out to be insufficient in law, yet the purchaser has, in equity, a vested lien on the property for the amount of his demand, and the defendant is estopped from coming into this court and setting up any defect in the title.

The conveyance of the sheriff under these circumstances is to be considered as the act of the defendant himself, and he shall not be permitted to impugn it; as between him and the purchaser he is precluded.

And if the defendant fail to pay, the property may be sold for the payment of what is due the purchaser, or the equity of redemption of the defendant foreclosed.

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In this case, it appears, that two judgments were obtained against Simon Vanness, in the common pleas of the county of Bergen: that at his request, Jacob S. Vanness paid the amount due thereon, and took an assignment of the judgments. Ano-

ther judgment was obtained by William and Robert Colfax against Simon Vanness, and execution issued; upon which the sheriff of Morris advertised and sold his property. Jacob Vanness became the purchaser, at the request and for the benefit of Simon, upon an understanding between them that Jacob should take the sheriff's deed and hold it as security for the money advanced, and Simon should be at liberty to redeem upon repayment of the moneys due from him to Jacob. Jacob accordingly paid the purchase money, and took the sheriff's deed. Simon continued to occupy the premises for some time, but failing to make payment, Jacob brought an ejectment to recover the possession. Upon this Simon filed his bill, setting forth the facts, offering to pay what was due to Jacob, and praying that he might be permitted to redeem, and also for an injunction to stay proceedings in the ejectment; which was allowed. Under this bill an account was taken, and the amount due from Simon to Jacob ascertained; but he failing to pay the same according to the decree of the court, his bill was finally dismissed, and the injunction dissolved. Jacob then attempted to proceed in the ejectment, but discovering that the judgment on which the property was sold, although regularly entered, had not been recorded; and that the execution was misrecited in the sheriff's deed, he filed the present bill, praying that the sheriff's deed might be reformed, and Simon restrained by injunction from setting up this discrepancy as to the execution, or the want of a record of the judgment; or that the deed might be established as a lien or equitable mortgage upon the premises, and that the premises might be sold, or the equity of redemption foreclosed. To this bill Simon demurred; and the cause came on to be heard upon the bill and demurrer.

*T. Frelinghuysen*, for complainant. The bill has two general objects: 1. In aid of the ejectment at law, to reform the sheriff's deed, or injoin the defendant from setting up the mistake in reciting the execution, or the want of a record of the judgment in that suit; and 2. To establish the sheriff's deed as a mortgage or lien upon the property, and that the premises may be sold as the defendant's, and he in like manner injoined from

setting up these mistakes and discrepancies. The state of facts to sustain this equity we have from the defendant, Simon Vanness himself, and sworn to by him in his bill against Jacob, filed in this court, for an injunction against the prosecution of an ejectment, which Jacob had instituted against him. The facts stated in that bill, are, 1. That Robert Colfax and William Colfax, in 1806, obtained a judgment in the supreme court against Simon Vanness, the complainant, for four hundred and thirty-one dollars and thirty-five cents debt, and one hundred and nine dollars and twenty-six cents cost: 2. The execution, to Edward Condict, sheriff: 3. The sheriff's sale: 4. The embarrassment of the defendant, his application to this complainant, and the arrangement between them, that this complainant should advance the money, and receive the sheriff's deed as an indemnity; that the sheriff's deed was given to this complainant accordingly, on the 19th May, 1807; and that said defendant had applied for a reconveyance. The prayer of that bill was for a reconveyance; said Simon alleging himself willing and ready to account with the said Jacob, of and concerning any sums of money *intended to be secured by said deed.* Such proceedings were had on that bill, that the sum of two thousand six hundred and twenty-nine dollars and twenty-one cents, was found due to this complainant, under the security of said sheriff's deed; and the court decreed, that on the payment of that sum, with interest and costs, this complainant, Jacob Vanness, (who was defendant in that case), should reconvey to Simon; otherwise the said Simon's bill should be dismissed.

Under these circumstances, one plain condition of the parties is manifest: Simon is the borrower of money from Jacob, with these premises pledged as security, in this mode, of judgment, sheriff's sale, and deed, by the proposal of Simon himself. In this court, and as against Simon Vanness, this sheriff's deed is his mortgage to us, and he is fixed and concluded with every fact asserted in it. This he would be, had he not filed the bill to which I have alluded. Proving against him, his application to us to attend the sheriff's sale, and for his benefit receiving the sheriff's deed, would implicate him directly as a *party*, essentially connected with the whole transaction; and he would be estop-

ped in this court from disputing any of the matters, the existence of which was indispensable to the very arrangement which he, Simon, himself proposed. But in addition to this, he has thus distinctly and solemnly admitted and affirmed the whole history of this transaction, as set forth by us.

A party by his conduct and acquiescence will, in equity, be estopped from asserting his title, however good and valid it may be; and he will be precluded from impeaching his title by raising technical exceptions. These principles apply to the case, as considering this sheriff's deed as Simon's security to us: he proposed it, and adopted it, and substantially made it his own, and therefore he cannot gainsay it: 6 *Johns. C. R.* 166. But, second, he cannot dispute it, because he has in this court affirmed the contrary, sought relief, and obtained the interposition of this court by way of injunction; and sought and had a fair and full investigation and hearing upon a state of facts admitting the deed, execution and judgment, and therefore he cannot now dispute it. And, third, it is an admission on record, express and explicit, and never can be recalled or contradicted, especially in the same court.

The rule of law, that a party shall not impugn or defeat his own security, runs through all contracts; nay, a mortgagor will not be allowed even to set up a valid prior mortgage, when there is no mistake or discrepancy, because it would defeat his own title. So if a man had only by parol, acknowledged that he had no title, and had agreed to purchase the premises of the sheriff, he shall not be permitted to dispute the sheriff's title after such acknowledgment. So a party cannot contradict by evidence, what he has admitted in the pleadings, nor can the jury find any fact contrary to such admissions. In admissions that have been acted on, the party is usually concluded absolutely. In truth, it was deemed almost safe to go on at law; the only doubt arose from the strictness of that court, in requiring a formal judgment, and this recital of the execution being *a statute regulation:* the result of a dry rule at law, was feared in a strict court: *Bull. N. P.* 110, 298; *Gould's Esp.* 457; 4 *pt. Starkie,* 29, 30, 31; 8 *East. R.* 493, 458; 3 *John. R.* 459; 6 *John. R.* 499; 1 *Salk.* 286.

The equity of our case is, therefore, that after such repeated recognitions and admissions by Simon Vanness, and after he has induced us, on the faith of them, to act in this matter, he shall not dispute the existence of the judgment or the execution. And the rather we resort to this court, as, although the chancellor might think that on this point we were in no danger at law, yet we might still proceed in equity *for the sale* of these premises: for we are not bound to take the deed as an absolute one. The decree in the case of Simon v. Jacob Vanness, directs upon what terms Simon may have a reconveyance; but it leaves Jacob to all his remedies on the sheriff's deed or otherwise. Then we are entitled to have Simon restrained from setting up these defects at law, in the ejectment or in any other suit, under the authority of the sheriff's deed, and the decree of this court; or to a foreclosure of the equity of redemption, or sale of the premises, considering the deed as an equitable mortgage at least. And on the whole, we prefer a decree of foreclosure to that of sale, and pray accordingly. Then we can proceed at law, without the obstacles of this discrepancy and the defect of a formal judgment to embarrass us.

*S. Scudder*, for the defendant. 1. The demurrer denies the equity of the complainant's bill; and if the demurrer be well taken, the bill must be dismissed with costs: *Harrison's Ch. P.* 210; *Mitford*, 99; *ibid*, 102.

2. As to the two judgments against Simon Vanness, the defendant, in the common pleas of Bergen county, which the complainant alleges he paid. The bill does not state the amount of these judgments, or when they were entered; but it alleges that when complainant paid them, and took an assignment of the judgments, he thereby took the judgments as security for the money paid; and the fair presumption is, that there was property of the defendant in the county of Bergen, on which the judgments might have been executed, or the complainant would not have taken an assignment; and if he has neglected his remedy at law, he cannot come to equity for relief.

3. The bill alleges that Edward Condict, then sheriff of the county of Morris, by virtue of an execution against goods and

lands, issued out of the supreme court of New-Jersey, at the suit of Robert and William Colfax, against Simon Vanness, advertised the premises in question to be sold on the 7th of May, 1807: that Simon agreed that Jacob should buy the lands at the sheriff's sale, and that Jacob did buy, and paid the money mentioned in the execution, and took the sheriff's deed, and was to hold the lands subject to the equity of redemption still to be left remaining in Simon.

4. That of the term of May, 1824, Jacob brought ejectment, to which Simon appeared; and afterwards, in January, 1825, brought his bill in this court for relief, and obtained an injunction to stay proceedings in the ejectment; that Jacob answered his bill; that an account was taken before a master, who reported that Simon was indebted to Jacob two thousand six hundred and twenty-nine dollars and twenty-one cents; that a final decree was made thereupon, and that Simon was ordered to pay that sum of money to Jacob in six months thereafter, or that his bill should stand dismissed out of this court with costs. That Simon did not pay the money within the time limited, and that his bill was dismissed and stands dismissed out of this court with costs.

Now the only evidence before the court upon the complainant's bill in this case, that Simon the defendant is indebted to Jacob the complainant in the sum of two thousand six hundred and twenty-nine dollars and twenty-one cents, is the decree upon the report of the master, confirming that report; and by the complainant's own showing, the bill upon which that decree was made, stands dismissed out of court; and consequently, every thing that before had legal form and effect, was by the dismissal of the bill dissolved. So an injunction, by the dismissal of a bill, is dissolved: 1 *Harrison's Ch.* 317.

5. That after the bill of Simon was dismissed, then Jacob proceeded in his ejectment; and on search for evidence to support his ejectment, he could find no judgment or execution, and the complainant's bill expressly charges that there never was any such judgment or execution.

Now where is the complainant's equity? He seeks to attach his pretended debt to the lands for which the sheriff gave a deed,

or to have the defendant estopped from setting up, on the trial of the ejectment, the want of a judgment and execution, to support the deed made by the sheriff.

By what right, or even color of right, can the complainant's debt attach to the land? The sheriff's deed is not a defective execution of a power, it is an act done without any power at all. To enable the sheriff to sell, there must be a regular judgment and execution, and the execution must be recorded. In this case there is neither.

By what authority does this court hold lands bound for a debt? 1. When they are mortgaged for the debt, then the legal title is in the mortgagee, and the equity to redeem only in the debtor. 2. When the purchase money has not been paid, and a subsequent purchaser knows the fact, because the purchase money is an equitable lien upon the land. 3. When there is an equitable mortgage; i. e. when the attending circumstances are such as to show that the parties intended to mortgage, then equity will consider that done which ought to have been done; but even then, the court must assume that the mortgage was made: And when a man has borrowed money upon an agreement to mortgage, and left his title deeds.

But here there was no agreement to mortgage. The agreement was that the complainant should take the sheriff's deed; but it turned out that the sheriff could make no deed, and never did make any: for though he may have signed a paper in the form of a deed, still it is no deed, for he had no power to make one.

There is nothing, then, to enable the court to interfere; there is no fraud on the part of the defendant, or of any other person connected with him. The inattention of parties in a court of law can scarcely be made the subject of interference in a court of equity: 1 *Sch. and Lef.* 205. The entry of the judgment and the recording and signing, was no duty of the defendant. The proceeding was an adverse proceeding against him, contrary to his will; and though he may have supposed there was a judgment by which his lands might be sold against his will, still, there being no judgment, his lands remain unaffected by any rule of law or equity.

The complainant has a full and complete remedy at law; if the defendant owes him a debt, judgment may be obtained, and the lands subjected to its operation.

The court is asked to reform the deed. The answer I make to this is, I know of no such power in the court. Besides, there can be no deed without the previous proceedings on which to found it; and it will hardly be pretended that a court of equity can make a judgment for a court of law.

Lastly, the doctrine of estoppel is set up; odious at law, and where to be found in equity, the complainant's counsel has not attempted to show us: all his cases cited are cases at law.

They say that Simon will not be permitted to contradict the title made by the sheriff to Jacob, because by his bill he has already admitted it. I do not mean to say that Simon could be allowed to deny a fact admitted in his bill, heretofore dismissed, unless that fact was admitted by mistake. But Simon is not put to that necessity, for the complainant expressly states in his bill, that there was not any judgment or execution, and shows that Simon was mistaken in what he said in his bill. What the complainant means when he says Simon will not be permitted to deny the title made by the sheriff to Jacob, is difficult to understand. For the complainant, by his bill, expressly states all those facts which show that the sheriff made no title, and could make no title.

Now the doctrine of estoppel is, that where a man has admitted a fact in a deed, he shall not be permitted to deny the fact, though he could prove it otherwise. But if his adversary admitted the fact to be otherwise, I believe he would be allowed to agree with his adversary in the fact.

I can see no reason for maintaining this bill in any point of view. The complainant, by his own showing, exonerates the defendant from fraud, deceit, or any kind of management. It is the duty of the purchaser at sheriff's sale, to see that he has power to sell. *Caveat emptor* is the rule.

The parties stand in the same situation that they would if Jacob had bought at the sheriff's sale without the knowledge of

Simon, or against his will, except that Jacob, having paid the debt of Simon to Robert and William Colfax, by the request of Simon, he may recover it back at law. I therefore pray that the complainant's bill may be dismissed, with costs.

The Chancellor. It appears that prior to the year 1807, this defendant became embarrassed in his circumstances, and was indebted, among others, to the complainant, and particularly in the amount of two judgments, which were outstanding against the defendant, and which had been assigned over to the complainant at the defendant's request, on his paying the amount to the persons entitled. In May, 1807, his property was advertised to be sold by the sheriff of the county of Morris, on a judgment and execution in favor of William Colfax and Robert Colfax. At the request of the defendant, the complainant purchased the property at the sale, and took a sheriff's deed. It was expressly agreed that the defendant might redeem it on paying what was justly due to the complainant. The defendant continued in possession of the premises thus purchased for a number of years. And during this time the complainant made further advances of money to the defendant, until, the defendant ultimately refusing to account for the moneys received, or to pay the amount justly due, the complainant instituted an action of ejectment against him in the supreme court, in 1824, for the recovery of the possession of the premises conveyed to him in the sheriff's deed. Upon this the defendant filed a bill in this court, setting out particularly the facts of the judgment, the execution, the sheriff's sale, the agreement and the deed, and insisted that he was not indebted on a just account being taken, and that this complainant should be decreed to reconvey the property to him. The complainant was thereupon injoined from proceeding in the ejectment. The cause having been put at issue, and testimony taken on both sides, came on to be heard; and it was decided that the sheriff's deed was taken and held by this complainant to secure, save harmless and indemnify him for all advancements made, and responsibilities incurred by him for the defendant; and it was referred to a master to take an account of what was

due, if any thing, from the one party to the other. The master reported that there was due from Simon Vanness, the defendant in this cause, to Jacob S. Vanness, the complainant, in the sum of two thousand six hundred and twenty-nine dollars and twenty-one cents, for moneys paid and advanced to and for the use of the said Simon Vanness, and which were to be secured by the said sheriff's deed. This report was afterwards confirmed; and it was ordered and decreed that the said Simon Vanness should pay the amount of it to Jacob S. Vanness in six months, and that upon such payment, Jacob S. Vanness should convey the said land and premises contained in the sheriff's deed to the said Simon. And it was further ordered, that if the said Simon should refuse to pay the amount due, within the said six months, that the injunction should be dissolved, and the bill dismissed. He refused to pay the money found due, and the injunction was accordingly dissolved. The complainant was then about to proceed with his ejectment for the purpose of recovering possession of the property, when he discovered, upon examination, that the judgment on which the execution issued, by virtue of which the property was sold, was not recorded and signed, though duly entered in the minutes of the court; and also that the execution was erroneously set out and described in the said deed. Under these circumstances *he* now comes into this court for relief. He seeks it in one of two ways; and prays, either that the defendant may be restrained from denying the existence of a judgment, which in his own bill he admitted, and that he may be restrained from setting up, on the trial of the cause, the discrepancies between the execution and the sheriff's deed, or that in respect to them the sheriff's deed may be amended; or, he prays, that as the property has been declared by this court to be subject to a right of redemption, (which he acknowledges to be correct,) and inasmuch as the defendant has refused to pay the amount found due from him to the complainant, as heretofore ascertained by one of the masters of this court, and as the said amount is still due, that the defendant be decreed to pay the same to the complainant by some short day, and in default thereof, that he be forever debarred and foreclosed of and from all right and equity of redemption of and in the said lands, if he have any under the circumstances of the case; or otherwise, that the

land may be sold for the payment and satisfaction of the complainant's claim.

To this bill the defendant has demurred, and the case is submitted to the court.

I deem it unnecessary to discuss the question, how far this court might lawfully go in directing a court of law to dispense with the production of a judgment, which upon settled principles in such courts is necessary to the establishment of a strict legal title. The sheriff's deed might be reformed; but unless the judgment could be supplied, or the party enjoined from taking advantage of the want of it, the correction would be of no avail. The complainant's remedy appears to me to grow naturally out of the other aspect of the bill. The purchase was made originally with the consent, if not at the request of the defendant, and certainly for his benefit. The complainant was to have such an interest in the property as would indemnify him for the money he had paid, and for what he should afterwards advance. And he was to hold this interest under the sheriff's deed. Such was the security offered by the defendant, and accepted by the complainant. Now admitting the deed to be defective, it was unknown to both parties. The one intended to give, and the other to receive, a sufficient and valid security. And although it turns out to be insufficient in law, yet the party has, in equity, a vested claim or lien on the property for the amount of his demand, and the defendant is estopped from coming into this court and setting up any defect in the title. This conveyance of the sheriff, under the circumstances presented in the bill, is justly to be considered as the act of the defendant himself, and he shall not be permitted to impugn it. There are no other parties interested, so far as is known to the court, and as between him and the complainant, he is precluded.

And this places the matter on the most favorable footing for the defendant. If the property is worth more than the amount for which it is held, he will be at liberty to redeem it on payment of the sum actually due. Any other measure of justice the defendant ought not to require. If he fail to do so, I see no reason why the property should not be sold for the payment of what is

honestly due the complainant, or the right of the defendant entirely foreclosed.

The proper mode in which to afford relief, and also the mode of ascertaining the amount, are matters not necessary now to be decided.

Let the demurrer be overruled, with costs.

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SUSAN GRAY AND OTHERS v. JACOB R. FOX AND OTHERS.

It is a rule well settled in the English chancery, and adopted by this court, that if trustees loan money without *due security*, they are liable in case of insolvency.

As to what is due security, the principle to be extracted from the English authorities is, that the loaning of trust monies, and especially when infants are concerned, on private or personal security, is not a compliance with the rule that requires due security to be taken, and of course, that such loans are made at the risk of the trustees.

In England, a trustee loaning money must require adequate real security, or resort to the public funds. In this country there are few opportunities for investing in the public stocks; the stock of private companies is not considered safe, and investments in that species of stock would scarcely be encouraged by a court of equity; there is no other but landed security that would come within the rule, and the court would advise it to be taken in all cases where public stock cannot be had.

John Britton and Peter Fox, administrators of Arthur Gray, deceased, upon sale of a farm of their intestate, left one third of the nett proceeds in the hands of Moses Everitt, the purchaser, on his bond, as a fund, the interest whereof was to be paid to the intestate's widow during life, in lieu of dower; and after her death the principal to be divided among her heirs, some of whom were minors. Moses Everitt, the obligor, died, and his administrator was making arrangements to pay off this bond. Jonathan Britton (son of the administrator) applied for a loan of the money, and John Britton, with the knowledge and consent of Peter Fox, his co-administrator, assigned the bond to William Boss, received the money for it, and loaned this money to Jonathan Britton on his bond. Jonathan Britton at that time was in mercantile business, and reputed to be in good credit and able to meet his engagements, but was not a man of substantial property, and failed two years afterwards, and a loss was sustained. The trustees, in taking his personal security and trusting to his credit, acted with a degree of negligence which the court could not overlook, and were held responsible for the loss.

After this loan to Jonathan Britton, and before he failed, the guardian of some of the minor heirs applied to the orphan's court to have the money better

secured, when John Britton, the administrator, offered to the court to give a mortgage on two lots of land, to secure the payment of Jonathan Britton's bond. Whereupon the court, at a subsequent term, made an order approving said security, and ordering "that the said money remain on interest, on the security of the said bond and mortgage, until otherwise disposed of agreeably to the act of the legislature." This order is not in pursuance of the act of 13th June, 1820, (*Rev. L.* 779.) The case is not within the jurisdiction of the court, and the order is no protection to the administrators.

Although a farther security may be offered after the loan is made, and the court may approve that security; that does not alter the principle, or bring the case within the statute.

The proper course to be pursued under the eleventh section of that act, is, to obtain the leave and direction of the court, for the purpose of putting out the money; and not to put out the money first, and obtain a decree of confirmation afterwards.

A decree of the orphan's court on a matter over which it has jurisdiction, if fairly obtained, is not to be questioned; but it is a court of limited powers, and if it transcends its jurisdiction its acts will pass for nothing; and if an order is obtained by fraud or misrepresentation, it may be set aside or considered null.

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Arthur Gray, late of the county of Hunterdon, died in November, 1812, intestate, leaving real and personal estate, and leaving also a widow and a number of children and grand-children. Administration of the personal estate was committed, in due form of law, to John Britton and Peter Fox, both of whom are now deceased. The amount of the personal estate was small, and it became necessary to sell the real property for the payment of debts. An order for that purpose was accordingly obtained from the orphan's court of the county of Hunterdon; and the sale was made to Moses Everitt, for four thousand three hundred and forty dollars and ten cents. In October, 1814, the administrators made a settlement in the orphan's court, on which settlement it appeared there was a balance in their hands of three thousand eight hundred and forty-seven dollars and ninety-nine cents. Two thirds of this amount was afterwards paid by the administrators to the different persons entitled, and the remaining one third was retained, to pay the interest annually to the widow of the intestate, she having released her dower. The widow being dead, the heirs at law of the intestate come into this court for an account, and to compel payment of the sums due to them respectively. A part of the money, it appears, has been lost, and the personal

representatives of Britton and Fox refuse to make good the deficiency.

The complainants charge that it was agreed between themselves, and the administrators, and Moses Everitt the purchaser, that he the said Moses Everitt should retain this money in his hands, so that the interest might be secured for the benefit of the widow, and after her death the principal be distributed among those entitled; and that in pursuance of such agreement, Everitt, on the 1st of May, 1814, gave his bond to Britton and Fox for the said sum: that Everitt paid the interest annually up to 1822, at which time Britton and Fox assigned the bond against Everitt to one William Boss, on receiving from him the amount thereof, and loaned the money to Jonathan Britton, the son of one of the administrators, on his simple bond, without security; and that in December, 1822, John Britton executed a mortgage to Fox, his co-administrator or trustee, conditioned to be void on payment of the said sum by Jonathan Britton: that a considerable part of the money is now lost, and the defendants pretend that they are not liable to make good any deficiency, and that the loan so made to Jonathan Britton was under the sanction of the orphan's court, in conformity with the provisions of the act of assembly. The bill has been taken, pro confesso, as against the representatives of John Britton, who have neither appeared nor answered. An answer was put in by Peter Fox in his life time. He denies expressly the charge that the money was retained in the hands of Everitt under any agreement, such as is mentioned in the bill; and insists that Everitt was at liberty to pay the bond when he might be able, and the administrators were bound to receive the money. He states further, that the money remained in Everitt's hands until his death, which was in 1821; that it was understood in 1822 that his administrator intended by a sale of the real estate, to raise money and pay off the debts of Everitt; that having an opportunity to loan the money to Jonathan Britton, they assigned the bond over to William Boss; that his co-administrator, John Britton, loaned the money to Jonathan Britton, and took a bond payable to John Britton and Peter Fox, as administrators of Arthur Gray. He further alleges, that the assignment of the bond of Everitt was made by John Britton, his

co-administrator, without his knowledge or concurrence, and his name was put to it as a matter of form; that at the time the loan was made to Jonathan Britton, he was considered in the neighborhood and believed by the defendant to be a man in good credit; and that he paid two years' interest on the bond. The defendant then sets out a proceeding in the orphan's court. He states that some time after the loan to Britton, and in the lifetime of the widow, some person in behalf of some of the heirs of Arthur Gray, called on John Britton to know the situation of the money, and finding it loaned out on personal security, employed counsel to make application to the orphan's court to have the moneys secured by other security; that thereupon John Britton, being called on by the court, offered to give a mortgage to his co-administrator on two certain lots of land in the county of Hunterdon, to secure the payment of the said bond of Jonathan Britton; that the court being satisfied that such mortgage would be an adequate security, approved thereof, and directed the money to be continued out at interest upon the security of the bond of Jonathan Britton and the said mortgage, and caused an entry of said proceedings to be made on the minutes of the court. The defendant admits that Jonathan Britton afterwards proved insolvent, and that the mortgages were an insufficient security; but insists that as the order of the court was in all things complied with, he cannot be held answerable for any breach of trust or neglect of duty, and can only be made answerable for the sum realized from the property mortgaged (being the security taken,) which he proffers himself willing to account for.

John Britton having died, the cause was revived against his representatives. Witnesses were examined, and the cause came on to be heard upon the bill, the answer of Peter Fox, and the proofs.

*G. D. Wall*, for the complainants.

*N. Saxton*, for the defendants.

Cases referred to by the counsel. 1 *P. Wms.* 81, 83, 141, 241; *Pre. Ch.* 173; *Dick. R.* 329, 356; *Salk.* 318; 2 *Bro.*

*C. C.* 114; 3 *Bro. C. C.* 73, 90, 91, 95; 1 *Scho. and Lef.* 341; 2 *Scho. and Lef.* 242; 4 *Ves. jr.* 596; 7 *Ves.* 186; 11 *Ves.* 252; 16 *Ves.* 479; 5 *John. C. R.* 282; 7 *John. C. R.* 22; 19 *John. R.* 427; *Rev. L.* 779.

THE CHANCELLOR. Very little evidence has been taken on either side, and some of the material allegations in the bill and answer are not sustained. There is no proof to support the charge that the money was by the consent of all parties to remain in the hands of Everitt until the death of the widow, when the different persons interested might claim their shares, and it is expressly denied by Fox: on the other hand Fox, the defendant, has failed to show that the transfer of the bond to Boss was without his privity or approbation. There is reason to believe that the Everitt bond was about to be paid off. His administrator had applied for a sale of his real estate to pay debts, as early as October, 1821, and the order was granted in February, 1822, which was before the transfer and loan to J. Britton. The sale, it is true, was not actually made until March, 1823; nor was the money paid to Boss until 1824. The loan to Jonathan Britton was with the knowledge and consent of both administrators, and there is some evidence in relation to the solvency and credit of Jonathan Britton at the time, which will be adverted to hereafter.

Two questions present themselves:—

1. Was the conduct of these trustees such as ought, on principles of equity, to subject them to any personal liability, in case the whole or any part of this fund was lost? And,

2. If they are affected with such liability, will the proceedings in the orphans' court relieve them?

There does not appear to be any foundation for the charge in the bill, that the security was changed from any sinister or interested motives on the part of the administrators. I am willing to believe that they honestly thought it advisable and proper to assign the bond to Boss and to loan the money to some other person. If they are liable at all, it is not on the ground of corruption; it must be on the ground of negligence—that they have loaned out the money without taking due security, in consequence of which the greater part of it is lost.

It is a well settled rule in the English chancery, that if trustees loan money without due security, they are liable in case of loss by insolvency. This is a safe rule, and the court has no hesitation in adopting it. The duties of trustees are very important, especially where the rights of infants are concerned, and it will always be the pleasure of the court to protect them, so far as it may be done consistently with safety and sound policy. Safety demands that the conduct of trustees should be watched with scrupulous care. Sound policy requires, that the faithful steward should not be entrapped and ruined with technicalities and forms. The rule above stated, however valuable as a general principle for the government of the court, is not sufficiently definite to be of much practical use. We must go further, and inquire what is *due security* for moneys loaned by a trustee? Can the court adopt a general rule, or must each case be left to be decided on its own peculiar circumstances?

A review of the cases in England will lead us to the rule adopted on this subject by the court of chancery there, and will aid us in testing the propriety of its adoption here.

In the case of Sir Ed. Hale and the Lady Car, in chancery, 1637, referred to in 3 *Swans.* 64, in *notis*, the Ld. Keeper says, if a person intrusted with others' moneys, let it out to such as are trusted and esteemed by others to be men of worth and ability, if any loss happen, he shall not bear the loss. In *Morley* v. *Morley*, 2 *Ch. Ca.* 2 (1678,) the defendant being trustee for an infant, was robbed of forty pounds sterling, and also of two hundred pounds of his own money: the court held, he was bound only to keep it as his own, and allowed it to him in the account. And in *Jones* v. *Lewis*, 2 *Ves.* 240, (1750,) Ld. Hardwicke held the same doctrine. These cases (the two last especially) seem to go on the principle that a man will always be careful of his own property; and that if he extends the same degree of care to the property of others in his hands as to his own, he will be in no danger. If all men were prudent in the management of their own affairs, there might be safety in adopting this principle; but that is not the case, and hence the later authorities have sought to establish one more uniform and stable.

In *Adye* v. *Feuilleteau*, 1 *Cox*, 24, (1783,) an executor had

loaned money on a bond, and it was lost. He was held personally liable. Ld. Loughborough (sitting as a commissioner in chancery) said, it was quite a settled point that an infant's money could not be laid out on personal security, and that no such investment of trust money would be sanctioned by the court: and Baron Hotham, sitting with him, said, the court always disapproved of it. *Holmes* v. *Dring*, 2 *Cox*, 1, was a case before Ld. Kenyon at the rolls, in 1787. Two executors lent three hundred pounds on a bond with *security*. The obligors were in very ample circumstances at the time the money was lent, but afterwards became insolvent. The court said, that no rule in a court of equity was so well established, as that a trustee cannot lend an infant's money on private security. It should be rung in the ears of every person who acts in the character of trustee. In *Lowson* v. *Copeland*, 2 *B. C. C.* 156, (1787,) Ld. Thurlow held an executor chargeable with an outstanding bond debt, because he had not called it in, though the defendant, in his answer, stated that he supposed it was his own property as a part of the residuum of the estate, and that he had been so advised. In *Orr* v. *Newton*, 2 *Cox*, 274, (1791,) Ld. Camden disapproved this case, and considered it too strict; but it appears to be sustained by subsequent decisions. *Wilks* v. *Steward*, *Coop. Eq. Rep.* 6, (1801), is a very strong and decided case, and shows the determination of the court to abide by some safe and general principle, rather than trust to the judgment of trustees in every case. Testator directed his executors to lay out a legacy in the funds, or "on such other good security as they could procure and think safe." Sir William Grant, master of the rolls, was clearly of opinion that the executors had no power, even under this direction, to place out the money on personal security. This was followed by a still more rigorous case: *Powell* v. *Evans*, 5 *Ves. jr.*, 844, (1801.) Testator died in 1792. Part of his estate was out on real, and part on personal security. Three hundred pounds was loaned by the testator himself to one Price, and Roberts as his surety. The debts were paid, there were no legacies due, and there existed no necessity for calling in the money; and the interest being regularly paid up to 1795, the executor permitted the money to remain where it had been placed by the testator and where he

found it. In April, 1796, Price, the principal, proved bankrupt, and the security was unable to pay. The master of the rolls held, that where infants are concerned, trustees are not to permit money to remain on personal security; and they were charged with the loss. This was followed by the case of *Vigrass* v. *Binfield*, decided by the vice-chancellor in 1818, 3 *Mad.* 40; in which it was expressly ruled to be improper for an executor to loan money on a promissory note; and it was ordered to be paid into court.

In opposition to these very decided authorities, there is but one express decision that I have met with, and that is the old case of *Harden* v. *Parsons*, 1 *Eden*, 145; in which Ld. Northington says, that lending trust money on a note is not a breach of trust, without other circumstances *crassæ negligentiæ*. In support of his opinion he cites the case of *Rider* v. *Bickerton*, in 1743; but when that case is examined, as given in 3 *Swans.* 80, in *notis*, it does not sustain his position. This decision of Ld. Northington has long been repudiated; and in the late case of *Walker* v. *Simons*, 3 *Swans.* 1, (1818,) Ld. Eldon disapproved it in marked terms, and said it was different from the doctrines on which the court was accustomed to proceed.

The principle to be extracted from these authorities is, that the loaning of trust money, and especially where infants are concerned, on private security, is not a compliance with the rule that requires *due security* to be taken, and of course, that such loans are made at the risk of the trustee. The decisions for the last half century have been uniform on this point, and the law, therefore, may be considered as settled at Wesminster Hall. And it appears to me that the rule is a safe one, not only as it regards the *cestui que trust*, but the trustee also. There is a risk to the *cestui que trust*, even when investments are the most carefully and securely made in the stocks or on landed security. Stocks are liable to great depression. The abundance or scarcity of the circulating medium in a community, and the prospects of peace or war, to say nothing of the agitations caused by the spirit of restless and unprincipled speculation, are constantly causing a fluctuation in the stocks. So, in like manner, lands are liable to depreciate from similar causes, though not in so great a degree. Losses occasioned by a fall of stocks are to be borne, it has been

decided, by the *cestui que trust;* and I presume the same rule would be applied to a loss growing out of a depreciation of real property, where the investments had been originally made with due and proper caution. But the risk is greatly increased when trustees are permitted to loan out money on personal security, and to be free from responsibility in all cases where the borrower was at the time a man in good credit. No person is exempt from misfortune. The man who is to-day solvent, and even in affluence, may by some sudden and desolating visitation, be in poverty to-morrow; and if not so, he has, in consequence of there being no lien on his property, the power of disposing of it to answer sudden emergencies and pressing calls. And how often does it happen that the integrity of a man fails in the hour of temptation, and he is induced to make dispositions of his property which neither honor nor conscience can justify.

The rule is also a safe one for the trustee. It cannot be misunderstood; and being uniform and general, renders the path of his duty plain. It would ofttimes relieve him from the importunity of those who may wish to be obliged, and who may suppose they have personal claims upon him, but cannot give the proper security.

But though the principle appears to be so firmly settled in England, I do not find that it has been adopted to the same extent in this country.

In *Smith* v. *Smith*, 4 *Johns. C.* 281, the question came up incidentally before Chancellor Kent. As the case appeared before him he was not called on to decide it, but he gave his sanction to the doctrine, that a trustee loaning money must require adequate real security or resort to the public funds, so far as to express himself satisfied that it was a wise and excellent general rule.

In 1824, the case of *The Administrators of Richard I. Cooper* v. *The Executors of Isaac Cooper*, was decided in New-York by Chancellor Sanford: *Hop.* 233. It appeared that Isaac Cooper held two notes of one thousand two hundred and fifty dollars each, given by the Union Cotton Manufactory to Richard I. Cooper. He held them in trust for the representatives of Richard, and afterwards invested them in stock of the Otsego Cotton Manufactory, which became insolvent. The defendant alleged

that the investment was made in good faith, and was considered by all to be advantageous at the time. The case came up on the bill and answer, and the court decided the trustee was not chargeable. The case does not appear to have received much attention from the counsel or the court. The executor found the investment in one company; he changed it to another; and it appears by the very short opinion of the chancellor, that this change was considered by all to be advantageous. This may be taken as tantamount to an agreement on the part of those concerned; though it does not appear that the court put itself on that ground, but rather on the principle of good faith in the trustee.

I am not able to ascertain that the English rule has ever been adopted in this court, and I should feel some hesitancy in adopting it to the extent to which it is carried in their courts. The situation of the two countries differs very materially in many respects, and especially as it regards the facility of investments; and what may be a prudent rule of policy in one country, may not be in another. In England, property can always be invested in the funds. These are recognised by their courts as safe and permanent securities, and it is the policy of every branch of the government to consider them so. In this country, the amount of public or government stock is very small, and in an inland state like our own, there are few opportunities for investing in that kind of security. The stock of private companies is not considered safe, and investments in that species of stock would scarcely be encouraged by a court of equity. There is, then, no other but landed security that would come within the rule. This can most generally be attained, and the court would advise it to be taken in all cases where public stock cannot be procured. It is safe to all parties, and is in accordance with the policy of the act directing the mode in which the money of infants in the hands of trustees may be put out to interest.

But while I take this opportunity of commending the safety of the English rule, and of warning trustees how they deal with the property of infants without securing it on real estate or in the funds, I do not feel myself called on, in this case, to adopt it in its rigor. For, admitting that these trustees had right to loan this money on personal security, still, an examination of the

case has led me to the conclusion, that in making this loan, they did not exercise that degree of care and circumspection which will free them from liability in case of loss.

It appears, in the *first place*, that the loan was made to Jonathan Britton on his simple bond, without even any personal security.

At this time Jonathan Britton was a trading man; he was engaged in the lumber business, and was about to engage in mercantile pursuits, of all others, perhaps, the most hazardous, especially to the inexperienced. This should have induced great caution on the part of the trustees. They should have hesitated long, before they committed to his hands, at that time, and under those circumstances, so large a sum of money: and it is to be considered, also, that this loan was not temporary, for sixty or ninety days, but was intended as a permanent investment.

*Secondly*, They neglected to avail themselves of the privilege granted them by law, of putting out this money under the sanction of the orphan's court.

I do not mean to say that when trustees omit to avail themselves of that protection, they are always to be held liable: I am not called on now to affirm or deny that principle. I only mean to say, that the omission to procure such direction, is a species of negligence that must always have its weight. But,

*Thirdly*, The defendants have failed to show that Jonathan Britton was, at the time of the loan, a man of such property and substance as would justify the loan: nay, I think the contrary is plainly to be inferred from the evidence.

The testimony is not as full on this subject as it might have been. One of the witnesses, William Robertson, says, that about the time Britton got the money, "his credit was very fair as to his ability to meet his engagements." It may all be true, that he was reputed to be able to meet his engagements; yet the safe inquiry for the trustees to make, was, what is his property, and what are his means of securing a repayment? We find from the testimony of this witness, that his credit soon began to fail. In 1822, he commenced store-keeping, in the fall. In 1823, he removed to another stand; and in the former part of that year, he did a good deal of business, and was in good credit; but be-

fore the end of the year his credit began to decline, and people became doubtful of him. And when we look at the exhibition made of his concerns by the sheriff of the county, soon after, it is not surprising. It is proved that in 1823, he was prosecuted by the New-Hope Delaware Bridge Company, and that in October of the same year, a judgment in their favor was entered against him for one thousand four hundred and thirty-two dollars and fifteen cents, on which an execution issued and was placed in the hands of the sheriff. In February, 1824, another judgment was entered against him, in favor of Peter I. Nevius, for two hundred and sixty-three dollars and thirty-seven cents. His real estate appears to have been mortgaged for *more than its value.* A suit was brought on the mortgage, and in October, 1824, an execution issued out of this court against the property, for one thousand two hundred and eighteen dollars and ten cents. The mortgaged premises, when sold, brought but eight hundred dollars; while the amount realized by the sheriff from all the rest of his property, when sold, was less than two hundred dollars.

There is nothing to induce the belief that in the years 1822 and 1823, he parted with any valuable property, nor is his speedy insolvency in any way accounted for.

I think the manifest inference from these facts is, that Jonathan Britton, at the time the loan was made, was not a man of substantial property; and that a little inquiry would have satisfied the trustees of the real state of his affairs. These inquiries were not made: they trusted simply to the credit of the person with whom they were dealing, and in so doing, acted with a degree of carelessness and negligence which this court cannot overlook.

It does appear to me, that under these circumstances, the trustees can have no reason to complain, if they are held responsible for the loss.

The administrators, then, are to be charged, unless they are protected by the proceedings of the orphan's court; and this brings me to the remaining question in the cause.

The answer states, that after the loan to Jonathan Britton, Edmund Smith, who is guardian for a number of the infant heirs of Arthur Gray, was dissatisfied, and employed counsel to make application to the orphan's court to have the money better

secured: that Britton, one of the administrators, hearing of the proposed application, attended the court in October, 1822, and, being called on to have the said money secured by such sufficient security as the court should approve, offered to give a mortgage to his co-administrator to secure the payment of Jonathan Britton's bond: that the application was postponed to a special term of the court in December, at which time Britton again attended, and prayed the direction of the court in the premises. The court thereupon made the following order substantially, stating it to be "on the application of the administrators of Arthur Gray." It appearing to the court that the trust money had been loaned by the administrators to Jonathan Britton, on his bond; and the said John Britton (the administrator) now offering to give a mortgage to his co-administrator, on certain property, to secure the payment of the said money, and praying the approbation of the court thereupon; the court, on consideration, approve the said security, and order that the said money remain on interest on the security of the said bond and mortgage, until otherwise disposed of, agreeably to the act of the legislature. This order of the orphan's court, is set up by the defendant as a bar to all claims of the plaintiffs.

The orphan's courts are authorized to require executors and trustees to give security to persons interested, and also to one another, in certain cases specified in the act, and they are also authorized to give leave and direction to them to put out their minors' money to interest, upon security such as they shall allow of: *Rev. Laws*, 778–9. From the history of this proceeding in the orphan's court, given by the complainant, and from the decree entered by the court itself, I have been at a loss to ascertain what was the actual intention of the court. The proceeding appears to have originated with some of the heirs, who had fears for the safety of the money, and it is evident that it was originally an adversary proceeding. The defendant says, that Britton attended at the court in October, and *being called on to have* the said moneys secured by such security as the court should approve, he offered to give a mortgage to the defendant: on the other hand, the decree purports, on the face of it, to be on application of the administrators of Arthur Gray. If made on such application, it

must have been under the eleventh section of the act: *Rev. L.* 779. This section provides, "that executors, administrators, trustees or guardians, may, by leave and direction of the orphan's court, put out their minors' money to interest, upon such security and for such a length of time, as the said court shall allow of," &c. It is insisted on by the defendant, that the court acted under this section, and that their order is final and conclusive. The decree of the orphan's court on a matter over which it has jurisdiction, if fairly obtained, is certainly not to be questioned in a collateral way even in this court. But that court is one of limited power and jurisdiction. If it transcend its jurisdiction, its acts will pass for nothing; and if an order is obtained by fraud or misrepresentation, it may be set aside or considered null. Now, under the eleventh section, the orphan's court may give leave and direction to trustees, &c. to put out their minors' money. It does not appear that in this case any leave was obtained, or any direction asked of the court to put out this money. On the contrary, it appears that the investment was made some months before, and without any directions for that purpose either obtained or asked. The administrators assumed the responsibility themselves. This they had a right to do if they chose: I do not say it was proper for them to do so. In cases coming under the act, trustees may take the responsibility of loss upon themselves, or they may throw it on the court. If the latter course is pursued, the directions of the statute are plain. They must obtain leave and direction for the purpose of putting out the money; not put out the money first, and at some future day, when difficulties are foreseen or loss apprehended, go to the court and obtain a decree of confirmation. No such power is given to that court; nor have the administrators or trustees any authority, under the statute, to make such application. This may appear to be a rigid and harsh construction of the act, and I confess it appears so at first sight; but I think a moment's reflection will satisfy us of the propriety, if not necessity, of construing the power of the orphan's court in this respect strictly. It was doubtless the intention of the legislature that the trustee, in putting out minors' money, should be implicitly governed by the direction of the court. In all such cases, the court derives its information mostly from the representations of the

trustees themselves, who can or ought to have no possible temptation to impose upon the court. One common motive should govern all—that the minor's money should be safely invested. But so construe this statute as that trustees may invest money at their own risk, and at any time afterwards come before the court to seek a confirmation which shall shelter them from all danger, and be conclusive upon the rights of those who are not able to be heard, and who are reposing in the security afforded by the wholesome provisions of the law, and we place them before the court in a very suspicious attitude. Their object for coming there will be their own safety alone, and not that of the fund. You place them under strong temptations, such as many men are not able to resist; and any one who is conversant with the ordinary mode of doing business in that court must be satisfied that the greatest imposition would often be practiced, and the grossest frauds committed. I feel satisfied, therefore, to say that this order is not made in pursuance of any authority vested in the court, and not within its jurisdiction, and therefore is no protection to the administrators.

It is true that in this case the court did more than merely confirm the loan—they approved of the security that was offered. This does not alter the principle. Would the court, if the money had been in the hands of the administrators, have directed a loan to Jonathan Britton at that time, on such security? I think not: but the money was already loaned, and the court appeared willing to do something to save it.

As between the two administrators, Britton and Fox, I see no ground for any distinction. They both *concurred in the loan*, and the liability is joint.

Let an account be taken of the principal and interest due the complainants. The question of costs, and all further equity and directions, are reserved until the coming in of the master's report.

CITED *in Shepherd* v. *Newkirk*, 1 *Zab.* 309; *Black* v. *Whitall*, 1 *Stockt.* 586; *Vreeland* v. *Vreeland*, 1 *C. E. Gr.* 530.

JOSEPH KING v. JARRET MORFORD, JOHN PINTARD, AND JONATHAN McCLAIN.

In decreeing specific performance of agreements, the court is bound to see that it really does that complete justice which it aims at, and which is the ground of its jurisdiction.

If the claim for a deed is not just and reasonable; if the party has been grossly negligent of his rights, or has abandoned his contract, equity will not afford him relief.

Delay, amounting to apparent negligence, may be explained; and under special circumstances, as where there is a difficulty about the title, it presents no bar to relief in this court.

M., in 1822, enters into articles of agreement with K., to sell him a house and lot and one fourth of a wharf, for six hundred dollars, "to be paid in one year, upon receiving a good title." K. enters into possession of the premises, but is soon after ousted of the wharf by P., claiming under an adverse title; upon which M. brings an ejectment against P. to recover possession of the wharf; and the contract for the sale by M. to K. remains unexecuted until 1829, when K. tenders the money to M. and demands a deed. K. has not forfeited the privilege of coming into this court, for a specific performance, by the mere lapse of time.

If M., after entering into the agreement to sell to K., sells and conveys the same property to P. and C.; who, before they purchased, had been told "that M. had sold the premises to K.—that K. had purchased it, and had an article for it;" P. and C. do not stand in the situation of *bona fide* purchasers without notice, entitled to the special favor of the court: having purchased the title of M., with notice of at least some claim on the part of K., they stand in no better situation than M. himself, and must stand or fall by the merits of the case, as it exists between M. and K.

A written contract for the sale of real estate may be waived by parol.

Where M. leased a house and lot to K. for one year, at thirty-five dollars rent, and afterwards entered into an agreement to sell the house and lot, and one fourth of a wharf, to K.; and thereupon K. pays M. thirty-five dollars, upon an understanding "that it was to be considered part of the purchase money, provided the residue was paid in one year; if not, it was to go as one year's rent, at the option of K.:" If K. afterwards agree that the thirty-five dollars thus paid should be taken as rent, and with his consent it is endorsed on the article by M. as received for one year's rent; it operates as an abandonment of the contract to purchase, and there can be no pretence for a specific performance.

So if K., after the written agreement with M. for the purchase of the property, in a conversation with M. and A., says, "that he does not want the property—that he is willing M. should sell it to A.—that he would as lieve

A. should have it as any one;" this is an express abandonment of the contract to purchase, and though A. does not purchase, M. may sell it to another.

The bill in this case is filed for a specific performance of a contract entered into on the 10th day of January, 1822, between Jarret Morford of the one part, and Joseph King of the other part, for the purchase and sale of a house and lot of land at Red Bank, in the county of Monmouth, and also one equal fourth part of the landing at the said Red Bank, for the consideration of six hundred dollars, to be paid "on the receipt of a good title." King complains, that after making the contract, he went into possession of the property; that he occupied the landing at Red Bank until he was forcibly expelled therefrom, and his vessel set adrift, by John Pintard and Jonathan McClain, who were in possession of the other three parts of said landing, and who have since that time kept possession of the whole; that he, King, has ever since the agreement been in possession of the house and lot, under the contract: that he has at all times been ready and desirous to comply with his part of the agreement, and pay the purchase money, but that the said Morford has neglected and refused to make and deliver a good and sufficient title for the said premises, although the complainant has tendered to him in specie the amount due; and that afterwards, to wit, in December, 1828, Morford sold the premises to Pintard and McClain, the other defendants, who are endeavoring to obtain possession by ejectment. The bill prays for specific performance, an account, and an injunction.

The defendant, Morford, by his answer admits the execution and contents of the article of agreement, as set forth by the complainant; but alleges, that before the execution of the article, he had agreed with the complainant to lease to him the house and lot, for thirty-five dollars for one year; and that after the execution of the said articles of agreement, the complainant paid to him the sum of thirty-five dollars, which was to be considered as part of the consideration money, provided the residue was paid in one year; but if the complainant did not comply with the said articles by paying the money in one year, which it was at his option to do, then the said sum of thirty-five dollars was to be

considered and go as one year's rent of the said premises. That afterwards, on the 15th January of the same year, the said complainant desired that the sum thus paid should be deemed and taken as a year's rent; and that accordingly the same was endorsed on the article, with the permission and consent of the complainant, as received for one year's rent. That the complainant remained in the next year, also under an agreement to pay rent; and that during all that time the complainant never offered to pay the consideration money, nor did he demand a deed; but was considered by the defendant as having abandoned the agreement and holding as a tenant from year to year. That the complainant afterwards agreed that the defendant might sell the property to one James Appleby, who afterwards declining to purchase, the defendant sold it to the other defendants, Pintard and McClain, for six hundred and thirty dollars. A deed was accordingly given and executed, and it has been duly recorded. As to the tender of the purchase money, the defendant says, that on the 18th April, 1829, after the deed was made to Pintard and McClain, the complainant invited him into his house as he was passing by, and invited him into a room where he had money counted on a table, and told him that was the purchase money for the house and lots, and desired him to make a deed according to the contract: that the defendant, believing it to be a trick, left the house. He further says, that the sale to Pintard and McClain was a bona fide sale, and that he did not communicate to them any information touching the said articles of agreement.

The other defendants, Pintard and McClain, allege that they purchased without any notice of the claim of the complainant, and, as bona fide purchasers, are entitled to the protection of the court.

The injunction originally granted, was dissolved on the coming in of the answer.

A replication was filed, and witnesses examined. The material facts proved appear in the opinion of the court.

*J. F. Randolph* and *S. L. Southard*, for the complainant. This is a proper case for a specific performance. There has been a part performance of the agreement, and if so, the court will

enforce it. The grounds of defence set up in the answer, are disproved by the evidence. The making a title to the complainant is a condition precedent, and he could not be required to perform his contract until that was done. He has done all that was necessary on his part, by tendering the money. The delay is sufficiently accounted for by the difficulty attending the title. Pintard had taken possession, and claimed to hold the wharf under an adverse title, derived from the representatives of Eseck White. Pintard and McClain are not entitled to the protection they claim, as purchasers for valuable consideration, without notice. Independent of the presumption arising from King's possession of the house, as owner, and of the wharf, until ousted by Pintard; there is sufficient evidence, that both Pintard and McClain were informed of the sale to King before they purchased. There is not sufficient evidence of any acts amounting to a waiver on the part of King. The evidence as to his agreeing that the thirty-five dollars should be taken as rent, is unsatisfactory; and his consent that Morford might sell to Appleby was conditional, and did not amount to an abandonment of the contract, or authorize a sale of the property to any other persons.

*G. Wood* and *G. D. Wall*, for defendants. Under this agreement the tender of a deed is not a condition precedent; the covenants are mutual and independent. To entitle him to a conveyance, King should have tendered the money: but there was no legal tender; it is denied by the answer, and not sufficiently proved. The original contract of sale to King must be taken in connexion with the parol understanding that followed, when the thirty-five dollars was paid: taken together, they amount to a conditional agreement, that King should pay the purchase money and take a title within a year, or continue in possession as tenant. By agreeing that the thirty-five dollars should be taken and endorsed as one year's rent, he waived the contract; and afterwards expressly abandoned it, by agreeing that Morford might sell the property to Appleby. This authorized a sale to any one else; and it is immaterial whether Pintard and McClain had notice of the sale to King or not. The delay of the complainant, in not performing his part of the agreement,

or calling for a title until 1829, after Morford had sold and conveyed to Pintard and McClain, is sufficient to defeat his title to relief.

Cases cited:—1 *Saund. R.* 320, *n.* 4; 9 *Ves. R.* 608; 10 *Ves.* 315; 1 *Mad.* 322–3, 363; *Phil.* 479; 1 *John. C. R.* 273, 370, 475; 1 *John. C.* 131, 273; 2 *John. C. R.* 405; *Sugd.* 246, 249, 282; 16 *Ves.* 244, 249; 17 *Ves.* 433; 1 *Mer.* 282; 5 *John. C.* 224; *New. Con.* 230–1; 9 *John. R.* 450; 6 *Wheat.* 528; 4 *Ves.* 686; 12 *Ves.* 326; 13 *Ves.* 225; 14 *John.* 15; 9 *Cranch*, 456; 1 *Peters' C. C. R.* 380; 6 *John. C. R.* 222.

THE CHANCELLOR. The defence set up by Pintard and McClain, that they are bona fide purchasers, without notice, is not sustained by the evidence. Independently of the inference to be drawn from the fact that the complainant was in possession of a part of the property, there is sufficient evidence to show that both Pintard and McClain had that kind of information on the subject, which would amount to notice in this court. *Ebenezer Allen* testifies, that at the time when Pintard cast off King's boat from the landing, which was shortly after the contract between King and Morford was entered into, Morford told Pintard he was sorry he had cast off the vessel; that he had sold the lot and one quarter of the dock to King. *Richard Borden* also states, that he was present at a conversation between King and Pintard, shortly after the vessel was cast from the wharf; and King then told Pintard that he had an article from Morford that held part of the wharf, but said nothing about the house and lot being in the article. Pintard answered, that he cared nothing for King or Morford; that he had a lease from Eseck White to hold the dock, and had nothing to do with them. *David Taylor* states, in his evidence, that he had a conversation about this property with McClain, when king first took possession of the house, in which conversation he told McClain that King had purchased the property.

It follows, then, that Pintard and McClain do not stand in the situation in which they are represented by the answer. They are not bona fide purchasers without notice, and as such entitled to

special favor in this court. They purchased the title of Morford, having notice of at least some claim on the part of King, and thus purchasing, they stand in no better situation than Morford himself. They must stand or fall by the merits of the case as it exists between the original parties.

The original article of agreement is admitted by both parties. The contract appears to have been a valid one. The consideration was bona fide; and there is nothing like fraud, mistake, or surprise, that can be alleged against it. King, the complainant, went into possession under it, and is still in possession of the house and lot. The evidence shows, that if he ever had possession of any part of the wharf, he was very soon ousted by Pintard, who claimed it under a lease from Eseck White.

What, then, are the objections to a specific performance of this contract? On the part of Morford they are various.

*The first* is, that the claim is a stale one; that the contract was entered into in 1822, and no step taken to complete it on the part of King until 1829, after Morford sold to Pintard and McClain. It must be understood, however, that King was in possession of at least part of the premises; that he had been ousted from the residue; and that Morford, the vendor, was prosecuting an action against those who had disturbed King in the enjoyment of his rights. Under these circumstances it would be too strict to say that King had forfeited the privilege of coming into this court by mere lapse of time. Delay, amounting to even apparent negligence, may be explained; and under special circumstances, as where there is a difficulty about the title, it presents no bar to relief in this court: *Sug. on Vendors*, 280, 282. The facts in relation to this part of the case, are very different from those presented by the bill and answer at the time the motion was made to dissolve the injunction. And although I think it very clear that the complainant has not strictly pursued his rights, yet if the case stood on this point alone, I should be inclined to give him relief.

*The next* ground of defence is, that it was agreed at the time of the original contract, or very soon after, that if the purchase money was not paid in one year, the thirty-five dollars paid by King should be considered as one year's rent of the premises; that

King himself agreed that the money thus paid should go as rent; that it was endorsed on the article as so much rent received by Morford; and that, after that time, King occupied as a tenant, and not as a purchaser.

There has certainly been a good deal of looseness about this transaction, and it is difficult to reconcile all the testimony. If the thirty-five dollars was received and paid as rent, it operated as an abandonment of the contract, and there can be no pretence for a specific performance. But that it was so paid and received, is at least a matter of doubt. The testimony of *Timothy White*, relative to the repairs to the house, and the conversation he had with King about the payment of rent, would lead to the belief that King was there at that time as a tenant. Other circumstances, and the testimony of other witnesses, would lead to a different conclusion. There is reason to believe that both parties acted in this matter with great carelessness; and the complainant, in coming here for extraordinary relief, has not presented himself under the most favorable aspect for the consideration of the court.

Without, however, going so far as to say that this objection, standing by itself, would be available in the mouth of the defendant, I am satisfied, that when taken in connection with the next ground of the defendants' defence, it must prevail.

*This ground* is, that the complainant waived and abandoned the contract in express terms, before the sale of the property to Pintard and McClain. That a waiver may be by parol, is now well settled, notwithstanding the old rule, "*unum quodque dissolvi eo ligamine quo ligatum est.*" *Sudg.* 109; *Stevens* v. *Cooper*, 1 *Johns. C. R.* 429. The inquiry is, therefore, as to the fact.

It is in evidence, by the testimony of *James Appleby, jun.*, that in the fall of 1828, he was desirous of purchasing this property, and called on Morford to know if he would sell it. Morford said he would sell, but must see King, as he was under obligations to him, some way or other, to give him the refusal. Morford told witness he would let him know in a few days, and in the mean while would see King concerning it. He afterwards saw King, and then King, Morford and witness had a conversa-

tion about it, in which King said he was willing that witness and his brother should have the property. He also said "*he did not want the property*, and that he would as lief, or a little rather, that witness should have it as *any other persons.*" Soon after, Morford sold the property to Pintard and McClain, and after all this the alleged tender of the purchase money was made by King. It may be true, as urged by the complainant's counsel, that the complainant was willing that Morford should sell to Appleby, inasmuch as he expected to receive the privilege of running his boat to the wharf. This may have been his motive; but if the language of the witness is in any degree correct, the inference to be drawn from it is a much more extended one. After telling Morford he did not want the property; that Appleby might take it; that he would quite as soon, and perhaps rather, he should have it than any other person;—I do not see how he can call for a specific performance, although the sale was not to Appleby, but to some other person. Suppose the negotiation with Appleby had failed, can it be that it would have been necessary to consult Mr. King again, as to any other disposition of the property? I think not. The privilege appears to me to be complete; and having been acted on, and a sale having taken place in consequence of it, I feel constrained to consider the contract as expressly abandoned by the complainant: at least, he has placed himself in a situation, which does not call for the interference of this court, to aid him in carrying the contract into execution.

Whether or not a contract shall be ordered to be specifically performed by this court, is always a matter resting in sound discretion. "The jurisdiction," says Ld. Eldon, in 12 *Ves.* 331, "is not compulsory upon the court, but the subject of discretion. The question is not, what the court must do, but what it may do under the circumstances." If the claim for a deed is not just and reasonable; if a party has been grossly negligent of his rights, or has abandoned his contract, equity will not afford him extraordinary relief. The strict rule is this, that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise he will be left to his remedy at law. This rule may be considered too strict. But I do think, with Ld. Redesdale, 2 *Sch. and Lef.* 554, that conside-

rable caution should be used in decreeing the specific performance of agreements, and that the court is bound to see that it really does the complete justice which it aims at, and which is the ground of its jurisdiction.

After a very careful examination of this case, I cannot satisfy myself that the complainant stands in such a situation as to warrant a decree in his favor at the hands of the court.

As to retaining the bill for compensation, as was suggested by one of the complainant's counsel, it is only necessary to remark, that there is nothing in this case which would render such a course proper. It has not been shown that King has made any permanent improvements on the property. What has been done has been at the expense of Morford, and not of King. If King has sustained damage by being kept out of possession of the wharf or landing, his proper remedy is at law.

The bill is ordered to be dismissed, but without costs.

CITED *in Miller* v. *Chetwood*, 1 *Gr. Ch.* 208; *Van Houten* v. *McCarty*, 3 *Gr. Ch.* 148; *New Barbadoes Toll Bridge Co.* v. *Vreeland*, 3 *Gr. Ch.* 161; *Huffman* v. *Hummer*, 3 *C. E. Gr.* 90; *Tompkins* v. *Tompkins*, 6 *C. E. Gr.* 339; *Plummer* v. *Keppler*, 11 *C. E. Gr.* 482.

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## EBENEZER TUCKER AND OTHERS v. THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON.

The act of 13th November, 1823, which provides "that it shall and may be lawful for the Board of Chosen Freeholders in and for the county of Burlington, *at their discretion, to build and maintain a good and sufficient bridge* over Bass river, about one-quarter of a mile above the dwelling-house of Benjamin Mather, and one hundred yards below William Butler's, where the new road crosses the same leading from Tuckerton to Bridgeport, with a suitable draw therein of sufficient width for the convenient passage of vessels navigating the same,"—vested in the corporation the right to build the bridge at the place specified, whenever, in the judgment and sound discretion of the Freeholders, the right might be advantageously exercised.

The authority was not temporary, but a continuing power; it did not cease although it was not exercised by the then existing Board of Freeholders, or although the Board in 1826, might have decided that it was inexpedient to build the bridge.

This act clothed the Board of Freeholders with the same power to erect a bridge over the river at the place designated, that they have, of common right, to build bridges over other streams in the county not navigable.

*Semble.* That the Board of Freeholders have no authority to erect a bridge over a navigable stream, without an act of the Legislature expressly for that

purpose. The authority vested by such an act, is independent of the general law respecting bridges; and it is not necessary that the overseer of the highways should give notice to the director of the board of freeholders, of the necessity of a bridge at the place specified.

The Board of Freeholders having jurisdiction over the subject matter, this court cannot interfere upon the ground that their conduct has been arbitrary, or that the complainants have been denied a fair hearing. The right of supervision and correction is in the supreme court: it appertains to their general supervising jurisdiction.

The principle is universal, that where the rights of an individual are invaded, by the acts of persons clothed with authority, and who exercise that authority illegally, the persons aggrieved must seek redress by *Certiorari*.

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The complainants state, in their bill, that they are seized in fee simple of lands and premises, and in particular that Ebenezer Tucker is seized of a tavern house, store house, saw mill and wharf, and a large body of pine land and cedar swamp, at the head of navigation on Bass river, in the county of Burlington, where the road from Philadelphia to Tuckerton crosses said river, above where the new road from Tuckerton to Bridgeport crosses the same and the bridge in question is proposed to be erected: that large quantities of boards and lumber are annually sent down said river, and hay and merchandize unloaded at said wharf. They set forth the act of the 13th November, 1823, authorizing the board of chosen freeholders of the county of Burlington to build a bridge over Bass river, at the place where the new road from Tuckerton to Bridgeport crosses the same, (as stated in the opinion of the court,) with various provisions for the regulation and government of the bridge. They farther state, that at a meeting of the board on the 9th February, 1824, a committee was appointed to view the site: that on the 12th May, 1826, they reported to the board that they had viewed the site, and heard the parties, and believed it inexpedient to build the bridge at that time. That in May, 1828, a majority of the freeholders and residents in the neighborhood remonstrated to the board against the building of the bridge. That the subject was postponed until the 13th May, 1829, when another committee was appointed to view the site. That on the 8th February, 1830, this committee reported that they had viewed the situation, heard the parties, and united in believing that it would be expedient for the board to make an appropriation for building the bridge; the con-

sideration of which report was postponed until May, 1830, when a committee of the board was appointed to build the bridge.

The complainants then state, that the act only authorized the board to build the bridge in their discretion; and insist, that the first committee having reported unfavorably, and the board having then decided not to build the bridge, the discretion of the board was expended, and no longer existed: the legislature only intending that they should pass on the subject once. They complain, that the proceedings of the board have been irregular; that upon the last hearing before the board the remonstrances had been overruled and not read. They state, that the new road, on which the bridge is to be placed, has been only opened in part; that it is but little travelled, and the bridge would be of little use to the public. That notice of the necessity of building said bridge had not been given by the overseer of the roads to the director of the board, pursuant to the general law on the subject. (*Rev. L.* 385.) They farther state, that the river at that place is three hundred feet wide, and navigable for vessels of burthen; and that the erection of the bridge would materially injure the navigation, and depress the value of the complainants' property lying on the river above that point, without benefitting the public. And they pray that the board may be compelled to receive the remonstrances, and for a subpœna and injunction against building the bridge.

On filing the bill, and serving a copy of the bill and notice of an application for injunction, an injunction was awarded.

The defendants afterwards put in their answer, in which they admit the law and the proceedings of the board of freeholders; but insist that the freeholders violated no principle of law or equity in rejecting the remonstrances, as they were not verified, and went to falsify the report of a committee of the board, who long afterward had viewed the site, heard the parties, and believed the period had arrived when it was expedient to build the bridge. The defendants further allege, that the board never fully acted under the law until the period when they ordered the bridge to be built: that the first report was inconclusive, and of no force unless acted on by the board: that the board never decided not to build the bridge; but that after the first report of the committee,

no further proceedings were had in relation to the building of the bridge, until the second application to the board. And they submit, whether by these proceedings the discretion vested by the act in the board, was expended. The defendants farther state, that one third of the road intended to be connected with said bridge is opened, and in daily use, and that they believe the whole will be opened as soon as the bridge is built; and they insist that notice of the necessity of said bridge was not required to be given by the overseer of the highways to the director of the board, to enable the board to act under the law enabling them to build the bridge: that the act vested a special authority in the board, independent of the general law respecting bridges. They also insist that the bridge is a public improvement, and that this court has no jurisdiction over the proceedings of the board, in the exercise of the discretionary power vested in them by the act. They deny that the erection of the bridge will materially obstruct the navigation of the river, or injure the value of property lying above the bridge, but on the contrary say that it will enhance its value.

The answer was put in under the corporate seal of the board, with the usual affidavit by the director of the board annexed.

After the coming in of the answer, upon notice given a motion was made to dissolve the injunction: and argued by

*G. D. Wall*, for the complainants;

*B. R. Brown* and *G. Wood*, for the defendants.

Cases cited: 1 *John. C. R.* 18; 2 *John. C. R.* 371.

THE CHANCELLOR. The grounds on which it was deemed advisable to allow an injunction in this case, were these:—1. Because it was represented that Bass river, over which the board of freeholders were about to erect a bridge, was a navigable stream, and used by divers individuals for the purpose of navigation; and that great and irreparable injury would be done to private property by the erection of the bridge; and,

2. Because it was represented, and so appeared to the court, that the act of the legislature of 1823, under which the board

claimed authority to erect the bridge, was no longer operative; that it was intended to be, and actually was, temporary in its nature, and did not invest the board with an authority which might be exercised at their discretion, at any period of time, no matter how remote.

As to the first ground, it is sufficiently met by the answer of the defendants; from which it appears, that even if the stream at the place where it is sought to locate the bridge, is to be considered as a navigable stream, yet the injury that may result to private property is not of a character to require the interference of this court.

In looking into the second ground, in connection with the facts disclosed in the defendants' answer, I am perfectly satisfied the injunction cannot be sustained.

By an act of the legislature, passed the 13th November, 1823, it was enacted, substantially, as follows:—That it shall and may be lawful for the board of chosen freeholders in and for the county of Burlington, at their discretion, to build and maintain a good and sufficient bridge over Bass river, about one quarter of a mile above the dwelling house of Benjamin Mather, and about one hundred yards below William Butler's house, where the new laid road crosses the same, leading from Tuckerton to Bridgeport, with a suitable draw therein, of sufficient width for the convenient passage of vessels navigating the same.

This law vested in the corporation the right to build the bridge. The place where was particularly specified; but the time when the right might advantageously be exercised, was left to the judgment and sound discretion of the freeholders, the immediate representatives of the county. The authority was not temporary, such as to require its exercise by the then existing board of freeholders, and if not exercised by them to cease. Nor is it to be considered as ceasing, although the board might have decided in 1826, that it was inexpedient to build a bridge at the place specified. The power was a continuing power. By this special act, the board of freeholders were clothed with the same kind of power, to place a bridge over this river, at the place designated in the law, that they have constitutionally and of common right to erect bridges over other streams in the county, not navigable. The

power may be exercised, or it may be postponed in its application, or withheld altogether. The legislature did not intend, in any wise, to prescribe limits to the discretion of the board of freeholders. They meant simply to grant to them a power, which before they did not possess, and to leave them to exercise it when, and in such mode, as should be deemed most advantageous for the interests of the public.

It appears moreover, by the answer of the defendants, that the board never made a final decision on the application to build the bridge, until May, 1830, when they decided favorably: that although a committee of the board had formerly reported unfavorably to the building of the bridge, that report had not been finally acted on by the board. This being the case, there is no one principle on which it can be seriously contended, that the power of the board was at an end.

It is urged, however, that the board have not exercised their powers in a lawful way: that their conduct has been arbitrary towards the complainants, and that the complainants have been denied a fair hearing on the merits of the case.

If the board have power to act in the premises; if they have jurisdiction over the subject matter, this court can take no cognizance of the complaints contained in the bill. The right of supervision and correction is in another tribunal. In England, it belongs to the king's bench, and in this state to the supreme court. The principle is universal, that wherever the rights of individuals are invaded by the act of persons clothed with authority to act, and who exercise that authority illegally, the persons aggrieved must seek redress by *Certiorari*. It appertains to the general supervisory jurisdiction of the supreme court, exercising in that behalf the powers of the king's bench, to correct abuses of that character. The jurisdiction is not a doubtful one, nor is the exercise of power under it novel, either in England or in our own state. It is, then, to the supreme court that the complainants must resort to have their grievances redressed, and not to the chancery: 1 *Salk.* 145; 1 *Ld. Ray.* 469; 4 *John. C. R.* 352.

Let the injunction be dissolved.

CITED *in Allen* v. *Freeholders of Monmouth*, 2 *Beas.* 71; *City of Camden* v. *Mulford*, 2 *Dutch.* 54.

## THE STATE BANK AT ELIZABETH v. JOSEPH MARSH AND WILLIAM EDGAR.

Where the property of a debtor has been sold at sheriff's sale, and bought in by his friends for a nominal consideration, and upon a bill filed in this court the purchase has been decreed to be *in trust* for the benefit of creditors, and the property is ordered to be re-sold; the creditors having specific liens on the property at the time of the first sale, are to be paid first, according to their respective priorities.

The judgment creditor under whose execution the first sale was made, is not to be excluded, or limited to the sum produced by that sale. If the proceeds of the second sale will reach that judgment, in its order, the balance should be paid; or if the purchasers at the first sale have since paid off the judgment they are entitled to be reimbursed.

It makes no difference, that the property is under the direction of this court, as equitable assets; for in regard to them, where the law gives a priority, equity will not disturb it.

Executions out of justices' courts, are liens upon the personal property only; and where the trust funds, arising from the personal property, are exhausted by prior executions, they must be placed on the same footing with the general creditors.

The widow of the debtor had united with the trustees, in the sale and conveyance of his real estate, and the master was directed to report "what sum is justly due, and ought to be allowed, for her right thus conveyed." He reported, that she ought to be paid a gross sum of seven hundred and ninety-six dollars and eighty cents, (calculating that sum to be the present value of an annuity, equal to the interest of one third of the purchase money, for her life.) The allowance on this principle, though novel, appearing to be reasonable, and within the direction of the order of reference in this particular case, was confirmed.

Where trustees have managed a farm with prudence, and for the benefit of the property, and account for the whole net proceeds; although it might, perhaps, have been rented for something more, yet they ought not to be charged for the deficiency unless it can be considered as growing out of their "default or neglect."

The general principle is well settled, that trustees are not entitled to compensation for services rendered in the performance of their trust; under the order for "just allowances," they are entitled only to *charges* and *expenses*.

But when by the interlocutory decree, the master was directed to allow to the trustees "a just compensation for their *trouble*, charges and expenses, in taking care of the property, making sales thereof, or otherwise in and about the same"—they may not only be allowed for charges and expenses, but also be compensated for their trouble in taking care of the property, making sales thereof, and executing the trust; by a commission, which is preferable to the allowance of a gross sum.

State Bank at Elizabeth v. Marsh and Edgar.

The master having divided the direction, and allowed the trustees twenty dollars per annum for their trouble in the care and management of the farm; and for making sale of the trust property, collecting and disbursing the moneys, a commission of six per cent. The allowance for taking care of the property, being reasonable, was confirmed: the commission on the sale of the property, principally real estate, was reduced from six to four per cent. on the amount.

The direction to the master, "to take an account of the payments made by the trustees for and on account of the debts due and owing from the debtor, and the dates and amounts of such payments respectively," is complied with by his making a detailed statement of the payments made. But the trust property having been sold, and it being necessary to a final decree, it was referred back to the master "to take and state an account of the whole amount of the trust moneys that have come to the hands of the trustees, or with which they ought to be charged, according to the interlocutory decree and the directions now given, and of the allowances to be made to them for moneys retained or paid by them according to the trust."

This was a creditors' suit. There was an interlocutory decree, which states, "that it appearing to the Chancellor that the real and personal estate which belonged to James Smith, and which was purchased by the said Joseph Marsh and William Edgar, at the respective sales thereof made by Alexander Dunn, esquire, as sheriff of the county of Middlesex, and afterwards by Abraham Vanarsdalen, esquire, as sheriff of said county; and mentioned in the pleadings and proofs in this cause; was purchased by them, the said Marsh and Edgar, in the first place, *in trust* for the creditors of the said James Smith, and ultimately for the benefit of the family of the said Smith; and that the said Marsh and Edgar are to be considered as trustees accordingly. And that all and singular the real and personal estate purchased as above mentioned, after reimbursing and indemnifying the said Marsh and Edgar thereout, for the moneys duly and lawfully paid in respect thereto, ought to be liable and chargeable to and with the payment of the debts which were, at the time of said sales respectively, due and owing from the said James Smith to his creditors, accordingly: subject, nevertheless, to the liens and incumbrances then lawfully existing and being on said property. And thereupon it was ordered, adjudged and decreed, that the said real and personal estate be deemed and held liable and chargeable accordingly. And it was referred to N. Saxton, one of the masters of this court, (among other things,) to as-

certain and compute the amount of the money paid by the said Marsh and Edgar, either before or after said sales, for and on account of said purchases by them: and of the amount of money by them laid out and expended, in the management and taking care of said property, and in repairs or other beneficial improvements on the said real estate. And to take an account of the liens and incumbrances which were on the said real and personal estate at the times of the said sheriffs' sales, respectively: to ascertain the nature thereof, the amount due thereon, their legal priority, and to whom payable. Also, to ascertain and report what part of the said real and personal estate so purchased, still remained in the hands of the said Marsh and Edgar; and what part they had sold, or otherwise disposed of or wasted; and to ascertain the amount with which they ought to be charged, for the part so sold, disposed of or wasted; distinguishing where the widow of the said James Smith had united in any such sales; and that he report what sum was justly due, and ought to be allowed her, for her right thus conveyed. And to take an account of the rents, issues and profits which the said Marsh and Edgar had received, or without their neglect or default might have received, from the said real estate. And also to take an account of the payments made by the said Marsh and Edgar, for and on account of the said debts due from the said James Smith, and of the dates and amounts of the said payments respectively. And in taking the said accounts, to allow to the said Marsh and Edgar a just compensation for their trouble, charges and expenses in taking care of said property, making sale thereof, or otherwise in and about the same," &c.

In obedience to this order, the master proceeded to make the inquiries, and take the accounts directed, and made a report upon the several matters contained in the said order of reference, Among other things, the master reported, that the widow of the said James Smith had united with the trustees in the sale and conveyance of a farm, called the Point-neck farm; and upon the principle that, as dowress, she was entitled to the interest of one third of the purchase money during life, and that, being a healthy person under forty years of age, she might reasonably be expected to survive her husband twenty years; the master allowed her

a gross sum of seven hundred and ninety-six dollars and eighty cents for her right thus conveyed; calculating that sum to be the present value of an annuity, equal to the interest of one third of the purchase money, for that period of time.

Upon the coming in of this report, the complainants took the following *exceptions*:—

"*First.* For that the said master, in taking the said accounts, has allowed as liens upon the said estate of the said James Smith, deceased, judgments which were not liens on the said property; viz. the judgments of the Trenton banking company, of Andrew Bell, of Aaron Drake, and —— Birdsall; and has reported other judgments, as liens on the whole property, which were liens only on a part.

"*Second.* For that the master has allowed a mortgage of Jedediah Swan, deceased, as a lien on the estate, without sufficient evidence of the existence of the said mortgage, &c.

"*Third.* For that the master has allowed the widow of the said James Smith, deceased, seven hundred and ninety-six dollars and eighty cents, for her right in the Point-neck farm, sold to Samuel Dunn; whereas nothing ought to have been allowed her, or if any thing, the allowance is much too great.

"*Fourth.* For that the master has not charged the defendants with the rents and profits received, or which might have been received out of the lands in which the said James Smith had a life estate.

"*Fifth.* For that the master has not charged the defendants with all the rents and profits received, or which with proper diligence might have been received, from the other real estate late of the said James Smith deceased, in their hands.

"*Sixth.* For that the master has allowed and deducted, for the widow of the said Smith, one third of the rents and profits, without charging her share with the one third of the taxes and expenses of carrying on the said farm.

"*Seventh.* For that the said master has allowed the said defendants, as trustees, large commissions on the sales made by them: whereas, the trust springing out of wrongful acts, no commissions ought to have been allowed, or if any, the commissions allowed are much too large.

"*Eighth.* For that the said master has allowed the defendants, for payments on recognizance to Abigail Blanchard, which have not been paid, or if paid ought not to have been allowed.

"*Ninth.* For that the said master, in his report, has made statements of the items of the defendants' account, without deciding, and reporting his decision upon them, and whether the same are or are not allowed."

The exceptions were argued by

*G. Wood* and *I. H. Williamson,* for the complainants;

*G. D. Wall* and *S. L. Southard,* for the defendants.

THE CHANCELLOR. The first exception is, that the master has designated and allowed as liens on the property at the time of the sale, judgments which were no liens.

Four judgments are specified:—

1. The judgment in favor of the Trenton banking company.
2. The judgment in favor of Andrew Bell.
3. Drake's judgment in a justice's court; and
4. Birdsall's judgment, also in same court.

First, then, as to the judgment of the Trenton banking company. This was not a lien on the property at the time of the first sale by sheriff Dunn. That sale was on the 18th January, 1819, and the judgment was not rendered until the 23d February, 1819. But it was a lien on that part of the property which was subsequently sold by sheriff Vanarsdalen, in September, 1820. The complainants have charged in their bill, and such appears to be the fact, that the sale by sheriff Vanarsdalen was in virtue of an execution issued on that very judgment. I do not, therefore, see with what propriety it can be contended that it was no lien. It was argued, however, by one of the counsel for the complainants, that the property sold under that judgment and execution brought only three hundred dollars, and that the execution can receive no more; that for any thing further the Trenton banking company must come in as general creditors. I cannot concur in this opinion. I do not find that the Trenton banking company ever agreed that this property should be sold for a

nominal consideration, and purchased in by the defendants, for the general benefit of the creditors. The property was sold under their execution, without any such understanding. It turns out afterwards that this court, for good cause shown, is constrained to decree that the purchasers hold the property not absolutely, but as trustees for the benefit of the creditors of Smith. The property is ordered to be sold. It appears evident to me, that creditors having specific liens on the property are to be paid first, according to their respective priorities. If, then, the proceeds of the sales will reach this judgment in its order, why should not the balance be paid? What has the Trenton banking company done to forfeit its claim? Or, if Marsh and Edgar have satisfied this execution, why should they not be reimbursed, if there are sufficient funds? It makes no difference that this property is now under the direction of this court as equitable assets; for even in regard to these, where the law gives a priority, equity will not destroy it: 10 *Johns.* 522.

As to the judgment of Andrew Bell, that appears also to have been a lien on the property prior to the sale by Vanarsdalen; and it is stated in schedule 4, of the master's report, that there was an execution in the hands of the same sheriff. If so, the same principle will apply to this judgment also; and I am not satisfied that the judgment would not be a lien even without an execution.

The executions out of the justices' courts were also liens on the trust property at the time of the sale, or at least on a part of it, and the master has done right in so reporting them. It is contended, however, that they ought not to be paid out of the trust property, because they were only liens on the personalty, which was exhausted by prior incumbrances. The amount of the personalty is not to be taken from the sale list of the sheriff. This property was afterwards disposed of again by Marsh and Edgar, at an advance of nearly one thousand dollars, with which they are rightfully charged by the master. But even with this addition, the personal property would all be exhausted in the payment of prior liens. The executions of the State Bank at Elizabeth and the Newark Banking and Insurance Company, were both prior to the executions out of the justices' courts, and they swallowed up the whole of the personal property. These executions

can be no lien on that part of the trust fund which is created by the real estate; they never were a lien on the real estate, and must be placed in relation to it on the same footing with other claims. I think the master's report is right, under the order: he was to state the liens on the property at the time of the sale, in their order of priority, and he has done so; but I do not understand the master to say, that because they were existing liens on the personalty at the time of the sheriff's sale, therefore they are to be paid at all events. He was not directed to report on that point.

2. The second exception, respecting the Swan mortgage, appeared to have been erroneously taken, and was not insisted on.

3. The third exception relates to the allowance of seven hundred and ninety-six dollars to the widow of James Smith, for her right of dower in the Point-neck farm.

The master was directed to inquire and report whether the widow of James Smith had united in any sales of real estate made by the trustees, and "what sum is justly due and ought to be allowed for her right thus conveyed." He reported that the trustees had sold certain real estate, that the widow had united in the sale, and that the sum of seven hundred and ninety-six dollars and eighty cents ought to be allowed for her right thus conveyed. I am not dissatisfied with this allowance. It appears reasonable; and under the direction, I think the master was right in computing the allowance in the manner he did. The principle is a novel one, I admit, in our courts of justice; but it is often adopted by executors and administrators in the settlement of estates, with the assent of creditors, and with great benefit to all persons interested; and I think it would be beneficial to all parties in this case. Without considering this as a precedent for the future guidance of the court, and believing that the master has acted substantially in conformity with his directions, I am inclined to overrule this exception.

4. There is no foundation for the fourth exception. I understand from the master's report, that the property in which Smith had a life estate, was, together with all the other lands, purchased by Marsh and Edgar, (except the Tharp place,) rented by them to Smith at a certain rent, which is accounted for

5. The fifth exception is, that the master has not charged the defendants with all the rents and profits received from the estate.

This exception does not appear to be sustained. The master has taken great pains to attain a just conclusion on this part of the case submitted to him. He ascertained, by the oath of the defendants and the examination of their accounts, which he states to have been accurately kept, that the whole of the net proceeds of the real estate, from the 1st of April, 1819, to the 1st of April, 1827, (eight years,) was two thousand six hundred and ninety-one dollars and ninety-eight cents, making an average of three hundred and thirty-six dollars and forty-nine cents per annum. On comparing this with the testimony of witnesses who were examined before him on the subject, he came to the conclusion that they should be charged the annual sum of three hundred and fifty dollars, as the fair rent of the premises. I see nothing in the evidence to satisfy me that this is incorrect. And if, as some of the witnesses seem to think, the property might, if rented for a money rent, have produced a larger amount, yet the mode pursued by the trustees was certainly a prudent one, and such as they judged most for the benefit of the property ; and they ought not to be charged, unless the deficiency can be considered as growing out of their default or neglect. The property was kept in good repair and increased in value.

6. The allowance of one third of the net proceeds of the real estate for the widow's dower is correct. In making the allowance in that way, her share of the land bears its full share of the expenses, which is all the complainants can desire.

7th Exception relates to the commissions allowed by the master. On this subject much has been said about the nature of the trust, and the conduct of the trustees. I do not know that it would be profitable for me to go into a particular investigation of the matter. The property in their hands was declared to be trust property by the court, and to be held in trust for different purposes than those set up by the defendants in their answer. The principle is well settled, that trustees are not entitled to compensation for services rendered in the performance of their trust. It is a principle not of modern origin, but has been so long established as to have become an axiom in the law. The cases on

the subject, from the earliest times to the present, are collected in *Manning* v. *Manning*, 1 *John. C. R.* 527. In that case the trustees set up a claim to a commission of five per cent. for their care and trouble in the management of the estate, and it was expressly disallowed: the court holding that they were entitled only to charges and expenses; or, in the language of the court, "just allowances." If, therefore, this question rested on general principles, I should have no hesitation in saying that the exception was well taken. But in this case I am to look for the true rule in the decree already made by the court. The master was to be guided by that, and the inquiry is, whether he has pursued his instruction. By the interlocutory degree, which appears to have been settled with great care, the master was directed, in taking the account, to make and allow to Marsh and Edgar "a just compensation for their *trouble*, *charges* and *expenses* in taking care of the said property, making sales thereof, or otherwise in and about the same." If I understand the meaning of this direction, it is, that the defendants shall not only be allowed, in taking the account, for their charges and expenses, but also for their trouble and care in executing the trust—not merely in taking care of the property, but in making sale of it, or otherwise in and about the same. Such kind of trouble and care is usually compensated in the shape of commissions. It is in this way that executors, administrators and guardians are compensated, and it is preferable to the allowance of a gross sum. The master, it seems, has divided this direction. He has allowed the trustees for their trouble, &c. in taking care of the property, twenty dollars per annum; and then for making sale of the real and personal property, and collecting and disbursing the money, he has allowed them a regular commission. I see no particular objection to this mode. The master might have put both together: by separating them he has given his view more clearly, and enabled the court to judge more distinctly of its correctness. To the first item there is no exception, and I do not see how there could be with any reason. Ten dollars a year to each trustee, is a very moderate compensation for the management of the property. The exception to the second item, (the commissions,) so far as regards the right of allowance under the decree, is not well taken: neverthe-

less it does appear to me that the rate of commissions allowed by the master is too high. Six per cent. is a liberal allowance for commissions on the *personal estate*, but much higher than is usually allowed to executors and administrators on the sale of *real estate*, especially where the amount is considerable; and I cannot think that these trustees stand before the court in the situation that executors ordinarily do. Considering that an allowance is made for their trouble in managing the estate, my opinion is that the commission should be reduced from six to four per cent. on the whole sum.

8. The eighth exception, relative to the recognizance to Abigail Blanchard, is not well taken and must be overruled.

9th Exception is, that the master has made a statement of payments made by defendants, on account of the debts of James Smith, but does not decide and specify which payments are to be allowed.

By the decree the master was directed to take "an account of the payments made by the said Marsh and Edgar for and on account of the said debts due and owing from the said James Smith, and of the dates and amounts of such payments, respectively." The master has complied with the order, and made a detailed statement; and in this he has done right. But it is necessary that something further should be done before the court can proceed to make a final decree. There should be a statement made of the whole amount of trust moneys that have come to their hands, or with which they are to be charged, according to the interlocutory decree and the directions now given; and of the allowances to be made them for moneys retained or paid by them according to the trust. The trust property having been sold since the master's report, he will now have it in his power to take and state an account which will present the whole matter to the court in one view, and enable it to make a final decree. To this end, I will refer it back to him to take and state such an account—charging interest on the payments and receipts, respectively, upon the principles adopted in the concluding part of the report.

The question of costs is reserved until the coming in of this report.

CITED *in Warbass* v. *Armstrong*, 2 *Stockt.* 264.

## JOHN H. DISBOROUGH v. JOHN OUTCALT AND OTHERS.

O. contracted with H. and B. for the purchase of a lot of land, procured materials, and borrowed money, which he applied to the erection of mills and improvements on the property; but becoming embarrassed, and these debts remaining unpaid, H. and B., at the request of O., conveyed the property to his son-in-law P.; who gave his own bonds and mortgages on the premises for the purchase money for the land, the cost of materials, and money borrowed to erect the buildings; and agreed in writing that O. might redeem the property, by reimbursing the monies so secured. This gave O. an equitable right; he was at liberty to take the property, on paying the purchase money and the incumbrances: and if at any time he had done this, he might have compelled a conveyance from P.

While things remained in this situation, O. confessed a judgment to D., upon which execution was taken out, and levied on the right of O. in this property; after which in consideration of another debt due from O. to N. B., for money advanced to complete these improvements, P. conveys the property to N. B. in fee, subject to the mortgages. The right of O. in the property was subsequently sold by the sheriff, on the judgment and execution of D., and conveyed to D., who became the purchaser. In this case, O. never having had the legal estate in the premises vested in him, not having paid the purchase money, or executed his contract, and not being in a situation to demand a deed, had a mere equitable interest or trust, not subject to the operation of a judgment and execution at law, which could not be sold and conveyed by the sheriff; and the conveyance passed no title to D.

At law, a judgment and execution constitute no lien on mere equitable rights, which are not susceptible of delivery, or possession: they operate on legal rights only; there must be a *seisin*, and this term always has reference to a *legal* title. The same principle is established in reference to mere equitable interests in personal property; they are not subject to levy and sale.

On this subject the decisions in courts of equity are in accordance with those at law; they consider the rights growing out of a judgment and execution at law, as *legal* rights: and while this court will, on various principles of equity, aid the courts of common law in the prosecution of legal rights, it will not undertake to enlarge or extend them.

Courts of equity will, in some cases, aid execution creditors to obtain satisfaction of their demands. But to warrant its interference, there must be some equitable ground presented; the case must be infected with fraud, or it must involve some trust or other matter of peculiar equity jurisdiction.

When a party comes into this court to obtain satisfaction of a judgment, he must present himself under some head of equity jurisdiction: he must show that the debtor has made some fraudulent disposition of his property, or that the case stands infected with some trust, collusion or injustice, against which it is the province of this court to give relief.

In cases of fraudulent transfers or assignments, the court will consider the conveyance as void, and the property as bound by the judgment and execution; and will give effectual relief to the diligent creditor.

It will interfere to remove equitable incumbrances, standing in the way of the parties' claim at law; and being once possessed of the case, it will ascertain and settle the rights of all parties concerned.

In cases of *direct trust*, such as mortgages of real estate, and pledges of personal property, the court will give aid on its own peculiar principles.

An execution creditor at law, has a right to come into this court and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate; and the party so redeeming will be entitled to a preference according to his legal priority.

A party, by his execution at law, obtains no vested interest in mere equitable rights, such as this court will aid him in securing; unless they are connected with some fraudulent or colorable disposition of property; or some direct trust, where the contract has been executed and the *cestui que trust* is in a situation to call on the trustee for the property; or where there is a right of redemption, as in cases of pledges or mortgages.

T. contracts to sell to O. forty acres of land for four hundred dollars, half of which was paid at the time, and the other half to be paid on the delivery of a deed: T. transfers all his right in the article of agreement, and the money due on it, to G., and furnishes him with a deed, to be delivered to O. on the payment of the money; G. tenders the deed to O. and demands payment, which is refused: G. then assigns the agreement to D.: D. obtains judgment and execution against O. for another debt, under which the right of O. in the premises is sold and conveyed by the sheriff to D.: D. in his bill now prays, that T. may be decreed to convey, and O. to release to him, all their right in the premises. In this case the legal right to the premises was not transferred to D. by the assignment of the agreement; nothing passed by it but the right to raise the two hundred dollars of purchase money remaining due.

D. acquired no title by the sheriff's sale of the right of O., because no title was vested in him; his right, under the agreement, being that of a purchaser under a contract unexecuted. D. can have no relief under the present bill.

*Semble.* That D. might have had a decree for a specific performance, on a bill filed for that purpose, against all parties concerned.

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J. Outcalt contracted with J. R. Hardenburgh and J. H. Bostwick for the purchase of a lot of land; he took possession of it, and erected mills and made other improvements thereon, and has since continued to occupy and use it as his own. Being embarrassed, and not having paid the purchase money for the lot,

being also indebted for the materials for the buildings, and money borrowed to pay the expense of erecting them; the property, at his request, was conveyed by Hardenburgh and Bostwick to Pierson (Outcalt's son-in-law) who gave his own bonds and mortgages on the premises, to Hardenburgh for part of the purchase money and the cost of materials, and to the trustees of Rutgers college for money borrowed to pay for erecting the buildings; in which it was said, and not denied, that a portion of the purchase money was also included; and agreed that Outcalt might redeem the premises on reimbursing the moneys so paid. Outcalt being further indebted to the bank of New-Brunswick, for money had from time to time to complete the improvements on the property, Pierson, with his consent, conveyed the property to the bank, in fee, subject to the prior mortgages, in satisfaction of this debt to the bank.

Outcalt had also contracted with G. Taylor for the purchase of another lot of forty acres, for four hundred dollars; half of which was paid, in notes, at the time, and the other half to be paid on the delivery of the deed. Taylor assigned all his right in this agreement, and the money due thereon, to W. Gordon, and delivered him a deed for the premises, to be delivered to Outcalt on the payment of the money. Gordon tendered the deed to Outcalt, and demanded payment of the money, which was refused. Gordon then transferred the agreement to Disborough, the complainant.

After this, while the title to the mill lot was in Pierson, before his conveyance to the bank, Disborough obtains judgment against Outcalt for an old debt; upon which execution was issued and levied on all the right of Outcalt in both these lots; and after the conveyance of the mill lot by Pierson to the bank, the right of Outcalt in both lots was sold under the execution, and conveyed by the sheriff to Disborough, who became the purchaser for two hundred and fifty dollars.

Disborough thereupon filed his bill in this court, against Outcalt, Pierson, the bank of New-Brunswick, the trustees of Rutgers college, Hardenburgh and Taylor; praying, as to the mill lot, that the conveyance to Pierson, and by him to the bank, might be set aside as fraudulent and void against the complainant, and that the possession of the premises might be delivered up to him: and

as to the other lot, that Taylor might be decreed to convey, and Outcalt to release, to him, all their right in the premises.

Answers were put in by Hardenburgh, Outcalt, Pierson, and the bank, and witnesses were examined. The facts, as far as they are material, appear in the opinion of the court. The case was argued by

*Th. Frelinghuysen*, for the complainant;

*C. L. Hardenburgh* and *G. Wood*, for the defendants.

Cases cited:—For complainant; *Rev. L.* 148; *s.* 1, 2; *ib.* 430, *s.* 1, 2; *ib.* 433, *s.* 12; 4 *Grif. L. R.* 1225–6; 3 *John. C. R.* 216; 4 *John. C. R.* 450, 454; *ib.* 671; *ib.* 687; *Amb. R.* 79.; *ib.* 596; 7 *John. C. R.* 208; 5 *John. C. R.* 280; 17 *John. R.* 351; 20 *John. R.* 504; 7 *Bac. Ab. Trust A.*

For defendants: *Bac. Ab., Execution, C.*; 1 *John. C. R.* 52–5; 1 *Hop. R.* 59; 5 *Hal. R.* 193, 201; 18 *John. R.* 98; 7 *John. R.* 206; 8 *East. R.* 467; 5 *Bos. and P.* 461–2; 5 *John. R.* 335–45; 3 *John. R.* 222, *n.* 6; 1 *John. C. R.* 16; 2 *John. C. R.* 312; *ib.* 283; 2 *Ves. jr.* 95; 1 *Ves. jr.* 196; 1 *Ans.* 381; 1 *Cain C. E.* 64; 2 *Atk. R.* 600; 3 *Atk. R.* 192, 356.

THE CHANCELLOR. It appears from the pleadings and evidence in this cause, that prior to May, 1824, John Outcalt, one of the defendants, contracted with John H. Bostwick and Jacob R. Hardenburgh, for the purchase of a lot of land and premises, of about forty acres, in the township of South Amboy, in the county of Middlesex; and that being in embarrassed circumstances, he caused the deed for the said property to be made out to his son-in-law, Daniel P. Pierson, with the consent of the said Pierson. The object of Outcalt, as stated in his answer, was, that he might "procure some property on which to reside: that being unable himself to purchase property, and destitute of money, his son-in-law agreed to become the purchaser, and took the deed for the same in his own name." It does not appear what was the amount of the purchase

money, but as the property was in an unimproved state at that time, it is probable the sum to be paid for it was not large.

The contract for this property was made some considerable time before the deed was given to Pierson. In the meantime, Outcalt was in possession. He erected a grist mill and snuff mill, and made other improvements, which greatly enhanced the value of the property. In making these improvements, Outcalt became indebted to Hardenburgh for materials. To secure this debt, and also a part of the purchase money, Pierson, on the 6th day of May, 1824, executed to Hardenburgh a mortgage on the premises for one thousand dollars, which was duly registered. On the same day, Pierson gave his bond and a mortgage on the same property to the trustees of Rutgers college, for the sum of two thousand dollars. This sum was appropriated by Outcalt for the payment of the improvements before mentioned. The deed to Pierson bears date on the 4th, and the mortgages to Hardenburgh and the trustees of Rutgers college on the 6th May, 1824.

Previous to this period, Outcalt became indebted to the complainant for goods, wares and merchandise, money lent, &c. to a considerable amount; and on the 4th of October, 1825, confessed a judgment to him for one thousand four hundred and sixteen dollars and seventy cents. On this judgment an execution issued in March, 1826; and on the 31st August, 1826, the sheriff of the county of Middlesex sold the right and interest of Outcalt in this property, and also in a certain other lot of about forty acres, situate in the same county; and the complainant became the purchaser, for the sum of two hundred and fifty dollars. The sheriff's deed bears date on the 19th September, 1826.

It appears further, that in order to complete the improvements, Outcalt procured money at various times from the bank of New-Brunswick, and that for the purpose of securing the payment of said sums, Pierson, on the 5th August, 1826, executed to the bank a deed in fee simple for the first mentioned property. This deed was subsequent to the judgment and execution of Disborough, the complainant, and prior to the sale and sheriff's deed.

It appears also, by the answer of Pierson, that he executed a paper, agreeing to give Outcalt a right of redemption to the property, when he, Pierson, should be reimbursed. This paper is

missing, and cannot be produced; nor is it known to the court at what time it was given.

A part of the mortgage money was paid to Hardenburgh on his mortgage, but it is not shown who paid it; and the interest on the mortgage to the trustees of Rutgers college remained unpaid until after the conveyance of the property to the bank of New-Brunswick, when it was settled by the bank.

Under these circumstances the complainant comes into this court for relief, and prays that the deed from Bostwick and Hardenburgh to Pierson, may be decreed fraudulent and void as against the creditors of Outcalt, and especially as against the complainant: and also that the conveyance from Pierson to the bank may be declared void as against the complainant, and they be decreed to render to him the possession of the said property.

On this part of the case the controversy is between the complainant and the bank of New-Brunswick. It is admitted on both sides, that the mortgages to Hardenburgh and the trustees of Rutgers college must be paid. They were given by the person holding the legal title, and before the judgment and execution of the complainant, and of consequence before he could have had any lien on the premises.

With this brief view of the leading facts of the case, I propose to inquire, in the *first place*, what was the nature of Outcalt's right in the property, at the time Disborough levied on it by virtue of his execution.

I think there is no doubt that Outcalt originally contracted with Hardenburgh and Bostwick for the property. It is not in evidence that he paid any part of the purchase money. It is probable, from circumstances, that most of the improvements were made by Outcalt, while he held the property under contract. They were doubtless made for his own benefit, as he states in his answer. It appears, however, that no part of these improvements were paid for by Outcalt; and that after the deed was made to Pierson, in May, 1824, whereby he became the legal owner of the property, he gave his own bonds to the trustees of Rutgers college for the moneys that had been borrowed of them for the purpose of erecting the improvements; and also gave to Hardenburgh his own bond for the money due him for materials, in

which bond was included part of the original consideration given for the property. These bonds were both secured by mortgages on the property. The legal estate then was in Pierson. He received the conveyance from the grantors; and he was personally bound, not only for a portion of the original purchase money, but for the value of all the improvements. Outcalt, nevertheless, was in possession of the property. He had the management and control of it, and reaped the benefit. And there was an agreement that Outcalt should have the right of redeeming the property when Pierson should be reimbursed. This gave to Outcalt an equitable right. He was at liberty to take the property, on paying the purchase money and the incumbrances; and if at any time he had done this, he might have compelled a conveyance from Pierson.

Such was the situation of things, and such the nature of Outcalt's right, when he confessed the judgment to Disborough, and when Disborough levied on the property. The right of Outcalt rested merely in equity. He had never paid off the incumbrances, and thereby placed himself in a situation to demand a title at the hands of Pierson.

What then, *in the second place*, was the effect of the proceedings against Outcalt; and what rights or advantages, if any, did they secure to the complainant?

Considering the interest of Outcalt as strictly an equitable interest, it could not be legally operated on by the judgment, levy, or sale. I take the principle to be settled, that at law, a judgment and execution constitute no lien on mere equitable rights. They are not susceptible of delivery or possession. The words of our act of assembly making lands liable to be sold for the payments of debts, though broad, do not embrace them: *Rev. Laws*, 433. By the first section, all lands, tenements, hereditaments and real estate, are made liable to be levied on and sold by execution; and by section twelfth the sheriff is directed to make to the purchaser "as good and sufficient a deed or conveyance for the lands, tenements, hereditaments and real estate so sold, as the person against whom the writ or writs of execution were issued might or could have made for the same, at or before the time of rendering judgment against him." It was contended at the bar that these words were

sufficiently comprehensive to embrace equitable estates; and the opinion of Mr. Griffith, in the 4th vol. of his *Law Reg.* 1225–6, was cited to sustain the argument. The learned editor of that valuable work gives a very decided opinion, that trust estates may under our statute, be levied on and sold by execution. I have not so understood the law. Judgments and executions operate on legal estates only. There must be a *seisin*, and this term always has reference to a *legal title.* Under the statute of Westminster 2d, (13 Ed. I. c. 18,) it was always held that a trust estate could not be extended. The power was given by the 29th Cha. II. ch. 3. This statute has not been re-enacted in this state, and the provisions of our act, before recited, do not embrace it. In the state of New-York, lands held in trust may be seized on a fi. fa. against cestuis que trust, but that is by special statute. In the case of *Foote and Litchfield* v. *Colvin and al.* 3 *Johns. R.* 222, Spencer, J., seemed to think that a trust property might be sold without the aid of the statute. And in the case of *Jackson* v. *Parker,* 9 *Cowen* 73, this opinion is approved. But in this state a different doctrine is maintained. In the late case of *Den* v. *Steelman,* 5 *Hals.* 193, it was held that a purchaser at sheriff's sale had not, before the delivery of the sheriff's deed, such an interest in the property as could be seized on and sold by execution. This case was decided upon full deliberation, and if there was any doubt before, may be considered as entirely removing it.

The same principle is established in reference to mere equitable interests in personal property. They are not subject to levy and sale. In *Scott* v. *Scholey,* 8 *East.* 467, the court of king's bench held, that a mere equitable interest in a term of years could not be taken in execution by the sheriff under a writ of fi. fa.; and Ld. Ellenborough, C. J., said that no single instance was to be found in the courts of common law in which such an equitable interest had ever been recognized as salable under a fi. fa. And in *Wilkes and Fontaine* v. *Ferris,* 5 *Johns.* 335, it was decided that where personal property had been assigned for the payment of certain debts, that the residuary interest remaining in the assignor, after the purposes of the assignment were fully answered,

was not such an interest as could be taken and sold on execution.

The decisions in equity on this subject are in accordance with those at law. They consider the rights growing out of a judgment and execution at law as legal rights; and while this court will, on various principles of equity, aid the courts of common law in the prosecution of legal rights, it will not undertake to enlarge or extend them. In the case of *Bryant* v. *Perry*, 1 *John. C. R.* 56, Chancellor Kent recognized the principle that a judgment at law is no lien on a mere equitable interest in land; and the execution under such judgment will not pass an interest that a court of law cannot protect and enforce. And in 2 *J. C. R.* 312, *Hendricks* v. *Robertson*, the same chancellor says, "I do not know of any case in which a court of equity has considered an execution at law as binding an equitable right. The idea is altogether inadmissible. If the execution cannot sell, there is no reason why it should affect or bind a mere equity, and the doctrine would be equally inconvenient and absurd." The correctness of this doctrine is admitted by Chancellor Sandford, in the case of *Donovan* v. *Finn*, *Hopk.* 74. See also on this subject *Dundas* v. *Duters*, 1 *Ves. jr.* 196; *Utterson* v. *Mair*, 2 *Ves. jr.* 95; *Cailland* v. *Estnick*, *Anst.* 381.

But the present case is peculiar, and would require great liberality on the part of the court to bring it within the rule contended for. The purchase money is not paid by Outcalt. The improvements are not paid for, and the amount of them is secured on the property. He was not, at the time of the judgment and execution, in a situation to demand a deed. His contract was unexecuted, and his interest rested merely in contingency. An interest or trust of so complicated a character, is not a proper subject matter to be operated on by an execution at law.

Taking it for granted, therefore, that the proceedings against Outcalt had no legal operation, and passed no estate to the purchaser, the question still recurs, what rights and advantages, if any, did they secure to the complainant? Was the equitable right of the defendant, Outcalt, *attached*, if I may make use of the term, by the judgment or execution, or did they operate as an equitable lien on it, so as to give them a preference to the claim

of the bank, and render the conveyance to the bank illegal and invalid? The question, how far mere equitable rights, property not tangible by an execution at law, may be reached by this court, independent of fraud, trust, or some other distinct ground of equity jurisdiction as a foundation for the interference, has often been agitated in the courts, and in some instances the decisions can scarcely be reconciled. The later opinion of Ch. Kent appears to have been, that the power of the court was sufficient to reach them: *Bayard* v. *Hoffman*, 4 *John. C. R.* 450. And in the recent case of *Egberts* v. *Pemberton*, 7 *John. C. R.* 208, the court seemed to consider that a judgment debt, being a demand reduced to a certainty, might, without any very great stretch of presumption, be looked on as so much money *held in trust;* and at the instance of a creditor, the plaintiff in the judgment was restrained from collecting the money on the execution. But on a careful examination of the cases, I incline to think that such a result is not fairly deducible from them, and that the opinion is not well founded.

Courts of equity will, in some cases, aid execution creditors to obtain satisfaction of their demands. It has for this purpose a suppletory power. But to warrant its interference, there must be some equitable ground presented. The case must be infected with fraud, or it must involve some trust or other matter of peculiar equity jurisdiction. The court will then act on its own established principles, and afford such relief as the situation of the parties requires and the nature of the case will admit.

It is on one or other of these grounds that the courts of equity have usually proceeded. In *Taylor* v. *Jones*, 2 *Atk.* 600, there was a voluntary conveyance of government stock made by a man to trustees, for the benefit of his wife and children; but being made after marriage, and not in consideration of marriage, it was held fraudulent. And the question was not, whether property of that kind could be reached by the court, but whether the assignment was fraudulent under the statute of 13th Elizabeth. The case of *Partridge* v. *Goff*, *Amb.* 596, was decided expressly on the ground of fraud. There was a voluntary gift for the purpose of defeating creditors, and Ld. Northington held that no man has such power over his property as to dispose of it to defeat creditors,

unless for consideration. The case was within the statute of frauds. Even the case of *Bayard* v. *Hoffman*, 4 *John. C. R.*, in which Ch. Kent assumes the principle, (on the strength of the cases above cited,) that the property might be reached without fraud, was the case of a voluntary settlement by an insolvent debtor, which was admitted to be void under the statute.

In cases of fraudulent transfers or assignments, the court will look on the property as bound by the judgment and execution, and will give effectual relief to the diligent creditor. See the case of *Hadden* v. *Spader*, 20 *John R.* 554, and the authorities there cited.

So, likewise, in cases of direct trusts, such as mortgages of real estate, and pledges of personal estate, this court will give aid on its own peculiar principles. It will interfere to remove equitable incumbrances standing in the way of the party's claim at law; and being once possessed of the case, it will proceed to ascertain and settle the rights of all parties concerned. There can be no doubt that "an execution creditor at law has a right to come into this court and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate; and the party so redeeming will be entitled to a preference according to his legal priority." 4 *John. C. R.* 692.

I am fully aware that some cases in New-York appear to have carried the power of the court so far as to reach equitable interests in the hands of third persons, where there was no fraud, and where the property could not be considered as held in pledge or mortgage. But most of the cases, when examined, will appear to have been infected with fraud. Even in the case of *Hadden* v. *Spader*, 20 *John. R.* 564, (which has been so much relied on,) Mr. Justice Woodworth, who carried the argument to the greatest extent, put himself upon this principle, that a debtor who had *placed his funds* in the hands of a trustee, where they could not be reached by an execution at law, could not put his creditors at defiance and enjoy the benefit of those funds; but that they ought to be appropriated to the payment of his debts. And Justice Platt rests his opinion on the ground that the assignment was fraudulent, and on that principle was willing that the

aid of the court should be extended to the diligent creditor. If this case, and the cases relied on in support of it, as decided by Ch. Kent, are to be taken as extending beyond this, and reaching all equitable rights and choses in action in the hands of third persons, without fraud, will it not lead to this general proposition, that this court will take jurisdiction and give aid to the creditor in all cases where the debtor has property or rights which cannot be reached by execution at law; and that the creditor to whom this relief is afforded shall have preference to all others? The injunction case before mentioned, in which a judgment debt due the defendant was actually impounded for the benefit of the complainant, shows how naturally the power of this court expands itself, unless restrained by settled and fixed principles. If such a debt or chose in action could be brought within the power of the court, so as to be given to an execution creditor, why not a bond debt, a legacy, or even a liquidated claim upon simple contract? Where would the power cease? and what would become of the insolvent laws, the policy of which is to distribute property ratably for the benefit of all the creditors of the insolvent? This subject has lately been before the chancery of New-York, in the case of *Donovan* v. *Finn*, *Hopk.* 59. An attempt was there made to extend the power of this court, so as to reach a legacy in the hands of executors. Donovan recovered a judgment at law against Finn, and issued an execution, which was returned *nulla bona*. Finn was at the time entitled to a certain legacy left him by his brother, which was still in the hands of the executors, and there was property sufficient to satisfy it. The plaintiff at law filed a bill in equity against Finn and the executors of his brother, to have the execution satisfied out of the legacy. The court dismissed the bill, and placed itself on the ground, that where a party comes into this court to obtain satisfaction of a judgment, he must present himself under some head of equity jurisdiction: "he must show that the debtor has made some fraudulent disposition of his property, or that the case stands infected with some trust, collusion or injustice, against which it is the province of this court to give relief." And the chancellor very justly remarks, that "if the court should take cognizance of such cases, it would form a chapter of jurisdiction far more ample than

any one it now possesses, and the assumption would be a bolder stride of power than was ever made by the English chancery in any single age."

Considering, therefore, as I am inclined to do, that a party by his execution at law obtains no vested interest in mere equitable rights, such as this court will aid him in securing, unless they are connected with some fraudulent or colorable disposition of property; or some direct trust where the contract has been executed, and the cestui que trust is in a situation to call on the trustee for the property; or where there is a right of redemption, as in cases of pledges or mortgages; let us next inquire, whether the interest of Outcalt, which was sought to be affected by the execution, was of that character.

And in the first place, was there a fraudulent transfer, assignment, or transaction, between Outcalt and Pierson, whereby creditors were to be defeated? It appears that Outcalt contracted for a small unimproved property. It does not appear that he ever paid any part of the purchase money. It is proved that a part of it is included in the mortgage to Hardenburgh given by Pierson; and it was alleged on the argument, that another part of it is included in the mortgage given to Rutgers college by Pierson. This was not denied. I take, then, these matters to be true, and in the absence of all proof to the contrary, go on the principle that Outcalt paid no part of the purchase money. Then the contract was made by Outcalt, and for his own benefit. He was to reside there; he had the management of the property, and procured the consent of his son-in-law to take the deed for the property. Still Outcalt did not pay for the property, nor did he secure the payment. His creditors were not deprived of any thing. There was no assignment or transfer of property out of his own possession into the hands of another, for the purpose of defeating creditors. The deed, it is true, was made to Pierson; but then he had to pay for the land, and became personally bound. What, then, did Outcalt vest in Pierson? At most, nothing more than his contract, his right to purchase and procure a title, by paying the consideration; and this was upon condition that he should possess the property and use it. Outcalt improved the property, and rendered it valuable by the erection of mills, &c.; but at whose ex-

pense? It is not discovered that he ever paid a dollar for any of these improvements. The cost of them is secured by the personal bond of Pierson, accompanied with a mortgage on the property. The result then is, that Pierson, who was the son-in-law of Outcalt, and with whose circumstances we are totally unacquainted, took a title for the property, became responsible for the payment, and permitted his father-in-law to live on it and support himself and family if he could do so, and improve it for his benefit, he, Pierson, becoming personally responsible for the cost of the improvements. All this might take place in perfect good faith, and with the best motives. And, although there are some circumstances in this case calculated to excite suspicion, yet it does not present itself to my mind as a case of covinous conveyance or fraudulent trust; and, consequently, the court cannot interfere on that ground.

It remains, then, to be considered, whether Outcalt can be viewed as having an equity of redemption in this property. It is manifest he never had any legal right. The title of the property was never vested in him. He had, at most, a right to pay the incumbrances, and reimburse Pierson, and then call upon him for a conveyance. It amounted to a contract for the purchase of the property, on the payment of a certain consideration. This consideration was never paid, nor the contract executed on his part. Outcalt was never in a situation to call for a specific performance. This is not like the case of a mortgage or pledge. In England, an equity of redemption cannot be sold by execution at law; but the execution will give a lien which a court of equity will protect. All that prevents the execution from operating on the mortgaged property, is the incumbrance. That being redeemed in equity, the impediment being removed, and the legal estate fully restored, the execution would be effectual at law; but chancery being possessed of the case, does that which a court of law would do; it secures the preference of the execution creditor. But, suppose the money paid in this case, would the legal title be in Outcalt? Surely not: it would remain in Pierson. The estate of Outcalt would still be an equitable one, and not liable to be sold on execution; though it might then be reached

in equity, in the mode in which his present equity is sought to be affected.

I am of opinion, therefore, that this case does not come within the ordinary jurisdiction of the court; that there is no sufficient evidence of fraud; and that Outcalt had no such right or estate in the premises as will justify the interference of this court, so as to give a preference to the judgment creditor.

I have reached this conclusion without reference to the situation of the bank, who are purchasers from Pierson after the judgment against Outcalt, and before the sale. It is admitted that their money was appropriated for the improvement of the property before the sale. They took it to secure themselves, and are bound to pay off the encumbrances. They offer the property to Disborough on payment of their demand. Disborough seeks to obtain it on payment of the incumbrances merely, to the exclusion of the bank; and if successful, the result would be, simply to transfer the money of the bank into his own pocket. This would certainly be hard equity against the bank, who, for aught we know, had no actual notice of the claim of Disborough at the time of their purchase.

As to the other lot of forty acres embraced in the deed, the facts appear to be these. In 1823, Griffin Taylor contracted to sell the lot to Outcalt for four hundred dollars. Half of it was paid in notes, and the deed was to be delivered when the money was all paid. In 1824, Taylor assigned his right in the article, and to the money due on it, to one William Gordon, and furnished Gordon with a deed to Outcalt, to be delivered when Outcalt should pay the balance of the purchase money. The deed was tendered, but Outcalt refused to pay. Gordon then assigned his right in the article to Disborough. The property in the possession of Outcalt was afterwards levied on, and the right of Outcalt sold, and purchased by Disborough.

This is not a bill for a specific performance. It does not seek that Outcalt shall be decreed to pay the two hundred dollars, on tendering the deed; but goes on the principle that the rights of Taylor and Outcalt are both vested in the complainant: the one by the assignment from Gordon, and the other by the judgment and execution or sale; and therefore that the court may decree

Taylor to make a deed to Disborough, and Outcalt to release all his interest in the property purchased. I do not see on what principle the court is to proceed in giving the relief prayed for. The complainant charges, that he has an equitable right to hold and enjoy the lands, *either* by virtue of the purchase, *or* under the assignment. It appears to me, that under the assignment he might probably have compelled a specific performance of the contract on the part of Outcalt; but it certainly cannot be enforced in this suit. What right of Outcalt did he purchase under the execution? or rather, what was the right on which the execution is sought to be made a lien? The right to compel a conveyance on the part of Outcalt, on paying the two hundred dollars due. This brings us back to the same principles already discussed, and will lead to the same results. The difficulty was attempted to be surmounted by the complainant's counsel, by showing that Disborough had not only the right under the execution and levy, but also the right of Taylor. But what was it that was transferred to Disborough by Gordon? Not the legal right of the property. It was not in Taylor's power to assign that to Gordon, nor did he attempt to assign it; and, of course, it could not be transferred from Gordon to Disborough. It was the right to receive the two hundred dollars from Outcalt, and to compel a performance of the contract; and it is not perceived by the court how the possession of this right can aid the complainant in this cause.

Upon the whole case, I am of opinion that the complainant has failed to establish any equitable ground for relief, and that his bill must be dismissed.

CITED *in Ketchum* v. *Johnson's Exrs.*, 3 *Gr. Ch.* 377; *Woodruff* v. *Johnson*, 4 *Hal. Ch.* 730.

# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

# STATE OF NEW-JERSEY,

JULY TERM, 1831.

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## SARAH C. WALLINGTON v. SAMUEL C. TAYLOR.

Thomas Taylor devised to his son Samuel, a farm, &c., "to him, his heirs and assigns, provided he had lawful issue; but if he should die leaving no issue living, then the said property to be equally divided between his three sisters." These terms, "leaving no issue living," are now taken to mean a failure of issue at the time of the death of the devisee, and not an indefinite failure of issue: consequently, the estate devised, instead of being an estate tail, must be taken to be a contingent fee, with an executory devise over.

But whether it be an estate tail, or a contingent fee, the power of the devisee over it is precisely the same; he has no power to commit waste, to destroy the inheritance.

The testator also bequeathed to his daughter Sarah, five thousand dollars "to be paid to her by the said Samuel, out of the estate given to him, in annual payments of five hundred dollars a year." This legacy is a charge on the estate of the devisee, (in the devised premises,) not upon his person or upon the land.

If, therefore, the estate of the devisee should cease, before the legacy is paid, the land would be discharged.

Although the devisee is not personally liable, yet the *nett* annual profits of the estate, if any, are to be appropriated, yearly, to the payment of the legacy.

The legatee is entitled to have her money; and if the devisee does not pay it, in exoneration of the charge, the estate must satisfy it in some way. The legacy is absolute, and does not depend on the annual value of the estate.

The devisee is liable, personally, to account for the nett profits which have come to his hands; and must be considered as holding them in trust, and responsible over to the legatee who is beneficially interested.

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On the 23d of January, 1823, Thomas Taylor, late of Burlington county, made and published his last will and testament,

in writing, executed in due form to pass real estate. He gave by it to his son Samuel C. Taylor, the defendant, the plantation on which he, the testator, then lived, with a house and lot adjoining the same, and all the buildings and improvements thereon; to him, his heirs and assigns, provided he had lawful issue: but if he should die leaving no issue living, then the said property to be equally divided between his three sisters. The testator bequeathed to his daughter Sarah C. Wallington, five thousand dollars, to be paid to her by the said Samuel C. Taylor, out of the estate given to him, to be paid in annual payments of five hundred dollars a year, without interest; the first payment to commence in one year after testator's decease.

The testator died, and the defendant entered into possession of the property so devised to him as aforesaid.

The first payment of five hundred dollars became due on the 21st of August, 1829.

The bill charges, that the defendant refuses to pay the first payment; that he is receiving the rents, issues and profits, refusing to account for any part of them; and is committing great waste and spoil on the premises. It prays, that the defendant may be decreed to pay the complainant the sum due, with interest; and in default thereof, that a receiver may be appointed; and if the rents and profits will not satisfy the legacy as it becomes due, that so much of the real estate charged with the legacy be sold to satisfy the same, according to the provisions of the will.

The defendant denies the commission of the waste, and insists that he has right to hold the property without impeachment of waste; and that he has a right to cut wood and timber for the payment of the annual legacy; and if he has not, he is willing and desirous that the premises be sold for the purpose of paying the legacy. The defendant protests against any personal liability for the payment of the claim; and alleges that the premises are so well timbered and wooded, that a sufficient quantity of wood may be cut yearly to pay the said legacy without detriment to the farm, and without committing any waste or injury whatever to the inheritance.

It appeared in evidence that the defendant had no children.

*G. Wood*, for the complainant. The devise is to S. C. Taylor and his heirs; but if he should die leaving no issue living, then over. This does not mean an indefinite failure of issue, but a definite failure of issue. The language is "leaving:"—When leaving? It must mean, at the time of his death, and not at some future indefinite period.

The estate devised is a contingent fee, with an executory devise over, and not an estate tail. In 3 *Hals. R.* 6, the words were, "without issue alive." This had reference to the death of the devisee for life. So in *Porter* v. *Bradley*, 3 *T. R.* 146; *Wilkinson* v. *South*, 7 *T. R.* 555; *Roe* v. *Jeffrey*, 7 *T. R.* 589.

The legacy is charged upon the *estate* devised to Samuel Taylor, in the premises; and not on the *land* generally, or on the person of the devisee. When that estate ceases, whether his estate be a fee tail or a contingent fee simple, the legacy is gone.

The legal estate is vested in the defendant. The beneficial interest, by this charge, is vested in the complainant, *pro tanto*, and she is entitled to so much of the nett proceeds of the devised premises, as will be sufficient, annually, to satisfy her legacy. The complainant's interest is of a primary, that of the defendant is of a residuary character: 2 *Ves. R.* 547; *Ch. Williamson's Op. Wood* v. *Wood.*

The legacy is a trust exclusively under the cognizance of a court of equity: 18 *John. R.* 428. Samuel C. Taylor receives the rents as trustee. They should be appropriated to satisfy the claim of the legatee. He stands in the situation of a trustee refusing to account for the trust moneys, and ought to be charged personally with the profits received: 1 *Mad.* 254; 2 *Anst.* 506; 1 *Atk.* 382; 1 *Paige*, 282, 8, 9.

The improper appropriation is a fraud on the *cestui que trust:* 1 *Paige*, 147. He ought to account for the rents, issues, and profits, and be restrained from committing waste.

The tenant of the contingent fee cannot commit waste: *Eden on Inj.* 122. Yet if he were tenant in tail under the statute *de donis*, he is, under our statute, only a tenant for life, and as such cannot commit waste.

The only difficulty arises from the defence set up in the answer; that the defendant is not bound to account for the profits received.

I admit that he is entitled to an equivalent for his labor. But we are entitled to have the nett profits applied to the payment of the legacy, until that is satisfied, principal and interest. A legacy charged on a dry reversion does not carry interest; but where the reversion is in possession, and yielding profits, it is otherwise: 6 *John. C. R.* 33.

*G. D. Wall,* for the defendant. This is an extraordinary case. The defendant has only an interest for life, and whether his estate be an estate tail or a contingent fee, is not important. A tenant in tail or of a contingent fee, has a right to commit waste, but not to the injury of the right of third persons.

The testator has given the legacy of five thousand dollars, five hundred of which is payable annually, out of the *estate.* It is not charged on Samuel, or on the land devised, but on the estate alone; and to the estate the complainant must look for her legacy.

It is said, the legatee has the beneficial interest in the estate; that her interest is primary, and that of the defendant secondary: but the case relied on from *Vernon's R.* does not support the principle. The question there was, as to the abatement of the specific legacy.

The complainant's counsel attempt to convert the defendant into a *trustee,* and the complainant into a *cestui que trust.* Then he would be a mere receiver. He does not stand in that relation. There is no dispute about the value of the property: it is not more than three hundred dollars per annum, out of which he is called on to pay five hundred dollars. This cannot be.

The devisee and legatee are both beneficially interested. The remedy of the legatee is upon the estate. The court may order the estate to be sold, if they think proper, to raise the legacy. The legatee has a right to take the estate, but not what the devisee has made out of it while in his hands. They have given the defendant no chance to make anything out of the estate. He is satisfied he can make nothing out of the land, and is willing that his estate in it should be sold; or he is willing to cut timber on the land for the payment of the legacy, under the direction of the court; but is not liable to account for the past rents and profits received.

*Wood*, in reply. This is not a case where the legatee can be let into possession. She has no legal interest in the land. The defendant is a trustee for the benefit of the legatee, he having the whole legal estate. I admit he is not personally liable for the legacy, otherwise he would be bound to pay it without regard to rents or profits. But he is a trustee; the profits ought to be appropriated annually to the payment of the legacy, and he is personally liable for the profits received. If he is not liable for the profits received, then he is not in default for not paying, and the legal interest cannot be sold without default. The testator could not have intended that the estate should be sold by piecemeal to satisfy the legacy.

THE CHANCELLOR. There is no difficulty, as I think, in establishing the relative rights of the parties, or in determining that the complainant is entitled to relief.

1. As to the estate of the defendant. Under the old cases, and as the law was formerly understood, I presume it would be considered an estate tail. More modern decisions have varied the rule, and the current of authorities is now the other way. The terms "leaving no issue living," are now taken to mean a failure of issue at the time of the death of the devisee, and not an indefinite failure of issue; and consequently the estate, instead of being an estate tail, must be taken to be a contingent fee with an executory devise over.

But this is not very important to the rights of the parties; for whether it be the one or the other kind of estate, the power of the devisee over it is precisely the same: he has no right to commit waste, so as to destroy the inheritance.

2. The legacy is a charge upon the *estate of the defendant*, not upon his person nor upon the land. If, therefore, the estate should cease before the legacy is paid, the land would be discharged from all liability or claim.

3. Although the devisee is not personally liable, yet the *nett* annual profits of the estate, if any, are to be appropriated yearly to the payment of the legacy. Such was, no doubt, the intention of the testator, and such is the reason of the thing. The

estate is *charged* with this annual payment, and the profits of the estate should be directed to satisfy the charge.

4. Whether the annual profits of the estate will equal the charge, is not material to the complainant, standing simply as a legatee. She is entitled to have her money; and if the devisee does not, or cannot pay it, in exoneration of the charge, the estate must satisfy it in some way. The legacy is absolute, and does not depend upon the annual value of the estate.

5. The nett profits of the estate, after giving to the devisee a fair and proper support out of the property, being liable for the payment of the legacy, if they have come into the hands of the defendant, he is liable personally to account for them. He must be considered as holding them in trust, and responsible over in this court to the person beneficially interested.

Such I take to be the situation and relative rights of the parties.

There is some difficulty in directing the mode of relief to which the complainant is entitled. To sell the whole estate, might be to sacrifice it, to the injury of all the parties; and besides, the whole of the legacy will not be due in some years, and the party has no right to call for it until it is payable according to the terms of the bequest. To sell a part of the estate every year, might be still more injurious. If it be true, as stated by the defendant, that there is such an abundance of wood and timber on the premises, as to admit enough to be cut down every year to pay the annual charge, and that without any injury to the land, that method might be resorted to with apparent propriety.

To enable the court to come to a just conclusion as to the facts, and to direct with more security the proper course to be pursued in reference to the whole legacy, I shall refer it to a master to enquire,

1. As to the amount of the annual *nett* profits that have come to the hands or use of the defendant, after making to him all just allowances for a fair and proper support out of the premises, from the time he came into the possession; to the end that he may be personally charged with the same; to be applied, *pro tanto*, to the extinguishment of the claim upon the estate.

2. To ascertain and report the quantity and amount of wood

and timber that has been cut on the property by the devisee, over and above what was necessary for the use of the farm; and whether the same still remains on the property unsold, or has been sold for the benefit of the defendant.

3. To ascertain and make report of, the quantity, kind, and value of the timber and wood upon the said premises, and how much, as to quantity and amount, may be sold annually without prejudice; and,

4. To inquire and report whether, in case it should become necessary to sell any part of the premises other than the wood and timber, the same or any part of it may be sold in parcels, and in what way most advantageously; or whether the estate is so situated as to render it expedient to sell the whole together, and what would be the probable value of said estate.

These facts being ascertained, the court will be enabled to give effectual relief as to the whole case. If, in the mean time, any waste should be attempted, the court will promptly interfere.

All further directions are reserved until the coming in of the report.

CITED *in Morehouse* v. *Cotheal*, 2 *Zab.* 440.

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SAMUEL RODMAN v. AMOS ZILLEY, DAVID S. ZILLEY, AND ELIZABETH BLAKELEY.

On a bill by the vendor, for specific performance of a contract for the sale of land at auction; where it appears that the vendee was induced to make the purchase by the fraudulent contrivance and management of the vendor, he can have no remedy to enforce the contract in a court of equity; but where the charge of fraud or collusion is not established against the complainant, the relief he seeks cannot be rightfully withheld on that ground.

So the vendee being intoxicated at the time, and not in a situation to judge correctly, or act with prudence, will not avail him to avoid the contract, unless he can show that it was procured by the contrivance of the vendor, or that an unfair or improper advantage was taken of his situation.

Courts of equity seldom interfere to set aside contracts of sale, on the ground of inadequacy of price; they leave the parties to their legal remedies. But when called on to enforce a contract, they examine into the consideration to be given, its fairness and equality, and all the circumstances connected

with it; and if any thing manifestly inequitable appear in that part of the transaction, they will never lend their power to carry the contract into execution.

There can be no objection to a contract made with a man in the habit of buying and selling, and transacting his own business, because he was illiterate, unless he has been grossly deceived or fraudulently imposed on.

The rule of this court is, that *time* may be dispensed with, if not of the essence of the contract. In this case, the time of the delivery of the deed was not held to be of the essence of the contract.

A party may waive his technical right in this respect, and the waiver need not be direct, or in writing, but may be inferred from circumstances.

So a prior incumbrance existing on the property, and known to the purchaser, is not a bar to a specific performance: but it may be referred to a master to enquire as to the amount of the incumbrance and state of the title, that the court may judge and take such order as may be expedient.

The waiver of a contract for the sale of real estate may be by parol, but it should be express, and of such a character as to leave no reasonable doubt as to the intentions of the parties.

Under conditions of a vendue "for the sale of the property of S. R." it is no objection to the execution of the contract, that a part instead of the whole of a lot of land was sold; provided it was made known what part was to be sold at the time it was set up.

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The bill in this case is to enforce the specific performance of an agreement for the purchase and sale of lands in the county of Burlington.

In 1826, A. Zilley had a mortgage and execution against Rodman, for about one thousand dollars. The mortgage covered fifty-five acres of land in the possession of Rodman. The execution was levied on the same property, and was in the hands of William N. Shinn, the sheriff of the county of Burlington, who was about to sell and make the money on the execution. Matters being thus situated, it was agreed, in order to avoid the exposure of a sheriff's sale, that the property should be sold at public sale by Rodman himself, the defendant in the execution, and that the money raised by the sale should be appropriated to the discharge of the execution in the sheriff's hands. The arrangement was made between the parties to the suit, with the consent of the sheriff. The sale took place on the 4th day of January, 1827; and thirty-five acres of said land, being set up and publicly ex-

posed to sale, were purchased by Amos Zilley, the plaintiff in the execution, for thirty dollars seventy-five cents per acre. A memorandum in writing, acknowledging the purchase, was immediately executed by Zilley. According to the conditions of the sale, the deed was to be executed on or before the 13th day of January, at which time one third part of the purchase money was to be paid, and for the residue approved notes were to be given, payable at three and six months. The complainant, alleging the tender of a deed to Zilley, the purchaser, complains that he refuses to comply with his engagement, and seeks the aid of this court to enforce the contract.

The defendant, Zilley, admits the material facts, as stated by the complainant; but alleges, as a justification for his refusal to comply with the conditions of sale and complete the purchase, that he was induced to make the bid and sign the conditions by the encouragement and persuasion of the complainant, and the assurance that he need not keep the property unless he chose; and that at the time he was considerably excited and intoxicated, and not in a condition to judge correctly; and that he is now fully aware that the property is not worth the money he bid for it. He denies also that the complainant tendered him a deed on the 13th day of January, or at any other time, in a lawful and proper manner, and that he has done any thing to waive a strict and legal compliance with the conditions on the part of the complainant. He further sets up, that the premises are subject to a mortgage made to James Hunter Sterling, which is prior to the defendant's mortgage.

Issue was joined, and witnesses were examined. The cause was heard upon the bill, answer and proofs, the substance of which appears in the opinion of the court. The case was argued by

*Ch. Kinsey*, for the complainant;

*G. D. Wall*, for the defendants.

THE CHANCELLOR. Let us examine these several matters, and see how far they are supported by the evidence, so as to be available to the defendant.

1. Was the defendant induced to make this purchase by the

contrivance and management of the complainant? for if this be the case, the complainant can have no remedy in a court of equity.

It appears somewhat singular that Zilley, having an execution on all the property of Rodman, which was an ample security for his money, should consent to purchase thirty-five acres of land, being only part of the real estate, for a full price, when it is evident he was not in want of property of that kind, and that it must prove to him rather an incumbrance than a benefit. But, however singular it may be, I do not find any sufficient evidence to make out against the complainant the charge of fraudulent procurement. It appears Zilley attended the sale, and probably at the request of Rodman. But if the property was to be sold by Rodman himself, when it was known that Zilley had an execution upon it for a considerable amount, it was certainly proper that Zilley should be present, to show that he approved of the proceedings. There is some evidence, not very satisfactory however, going to show that he was requested not only to attend, but to bid at the sale; but it was for the purpose of making the property bring a fair price, not to palm it upon him at an exorbitant rate, and thus take advantage improperly of an act of kindness.

It was alleged that some of the bidders at the sale, especially Philip Richardson, were induced to attend and bid at the instance of the complainant, and with a view of entrapping the defendant. Richardson, on his examination, expressly denies that Rodman used any persuasion or improper means to procure his bid. There is a discrepancy in the testimony of this witness upon another point, that renders it proper to receive his evidence with some caution. Yet as there is no direct testimony to prove any collusion between Rodman and any of the bidders at the sale, the evidence may be of some use to repel any presumption that may arise from circumstances. I do not find this allegation supported in point of fact.

After a careful examination of the evidence on both sides, I have not been able to satisfy myself that the charge of fraud or collusion is established against the complainant, and therefore the remedy sought by him cannot rightfully be withheld from him on that ground.

2. A second ground of defence is, that the defendant was intoxicated, and not in a situation to judge correctly or act with prudence.

The most important evidence in favor of this allegation is the statement of Rodman himself, made to Wills, when he went to get him to run out the land. He then told Wills that Zilley was a "little groggy at the vendue," and bid quite smartly. On the other hand, Rogers, the crier, savs, that Zilley was not disordered in his mind or rendered incompetent by the use of liquor. Sheriff Shinn says, he considered Zilley to be sober at the time of the sale. Richardson says, he did not discover him to be drunk. Daniel Williams testifies, that he saw Zilley after the sale, and on the same day, and that he appeared to be perfectly sober; and further, that he never saw him drunk. James H. Sterling, who was present when Zilley signed the conditions of sale, says, he has no recollection of seeing him intoxicated at that time. And it is to be remarked also, that Zilley, in all the conversations had with different persons after the sale, and which are detailed in the evidence, makes no mention of the circumstance.

But if the fact were made out, it could not avail the defendant, unless he can show that it was procured by the contrivance of the complainant, or that an unfair and improper advantage was taken of his situation. As to the first, there is no pretence for it whatever; and as to the last, it is difficult to arrive at such a conclusion, against the testimony of respectable witnesses, that the sale was a fair sale, and the property worth the amount bid for it, or very nearly so; and when we see, that shortly after the sale, the defendant was offered within a trifle of the amount he gave for it, and refused the offer. The defence can be of no avail to the defendant.

3. Another ground is, that the property is not worth the money.

Courts of equity seldom interfere to set aside sales and contracts, on the ground of inadequacy of price. They leave the parties to their legal remedies. But when they are called on for extraordinary aid to enforce a contract, they take the liberty to examine into the consideration to be given, its fairness and equa-

lity, and all the circumstances connected with it. And if any thing manifestly inequitable appears in that part of the transaction, they will never lend their power to carry the contract into execution. See the case of *Seymour* v. *Delancy*, 6 *John. C.* 222, in which all the authorities are reviewed.

What are the facts in this case, as to the value of the property? The defendant bid for it thirty dollars seventy-five cents. There were several persons who bid for the property. Cogswell bid, as he says, three or four times; his last bid was thirty dollars twenty-five cents. Richardson bid thirty dollars fifty cents, but from his evidence I think it may well be doubted whether he intended to be bound by the bid. The defendant, then, agreed to give fifty cents more on the acre than Cogswell. There is no evidence to show that Cogswell was unable to pay, or that his bid was a sham bid in any sense of the word. On the contrary, he says that his bid was a real bid, made in earnest; and in the absence of proof to the contrary, it must be taken to be so, and that he considered the land worth the amount of his bid. Independently of this, Cogswell says in his evidence, that he considered the property cheap at thirty dollars seventy-five cents per acre, at the time of sale, and also at the time of his examination. Richardson says he considered the land to be worth thirty dollars per acre. David Williams testifies, that Zilley, some little time after the sale, wanted him to buy the property, and offered to sell it to him, stating that the deed was in Wills's hands, and that he was fully authorized to sell. He came a second time, and appeared very anxious. Witness told him he did not want the property at any price, but nevertheless offered him twenty-seven or twenty-eight dollars per acre, he cannot say which.

It is evident from these facts, that the sum agreed by the defendant to be given for the property, was not far from the real value. Another circumstance on this part of the case has had great influence on my mind; and that is, that although the defendant has made loud complaints in court as to the extravagance of the price, he has not called a single witness to testify to the value of the land. Surely it would have been very easy to prove the charge, if it were true.

4. Again it is said, the defendant was illiterate, and not capable of taking care of his rights.

He certainly was an illiterate man, but he was in the habit of transacting his own business; of buying and selling, not only personal, but real property. He is represented to have been a close, contracted man in his dealings, and a tight man to make a bargain with. There can be no objection to a contract made with such a man, unless he has been grossly deceived or fraudulently imposed on, which does not appear to have been the case.

5. But it is objected that the deed was not tendered in time, and it is insisted that, under the circumstances of the case, the defendant is at liberty to avail himself of every defence, and hold the opposite party to strict rule.

There is no foundation for this objection. According to the conditions of sale, the deed was to be made by the 13th of January, when one third of the purchase money was to be paid, and the residue secured. Now it is in evidence, that the deed was actually made and executed, at the house of Wills, on the 11th of January, and that it was done in the presence of Zilley. The situation of the parties was such as to render a literal compliance with the conditions altogether unnecessary, if not impossible. Zilley was the purchaser, and he was also the creditor. There was no necessity for his paying one third of the purchase money to Rodman, or giving his notes for the balance. It appears that the deed was left in the hands of Wills, and the purchase money was to be settled on the execution. Sheriff Shinn says, he met Rodman and Zilley afterwards on the road, and spoke to them about this business. They told him they were going to Mount Holly to settle it; and Rodman said, in the presence of Zilley at the same time, that he would leave the sheriff's fees in the hands of Mr. Neale, who was the attorney. It further appears, that Zilley, after the execution of the deed, considered the deed as his, and also the property, and spoke of them as such. Shortly after the execution of the deed he went to David Williams, as before stated, to sell him the land. Williams asked him if he had got the deed executed: he said he had, and that it was left in Wills's hands, and that he, Zilley, had full power to sell the property. He afterwards told Williams that he did not get the deed

from Wills because he was not able to pay for the execution of it, and that Wills intended to keep it until he got his fees. Richardson says, that some weeks after the sale, (and after the time when the deed should have been tendered,) Zilley came to his house to see if he could not sell him the property, as he had bid for it at the sale. Witness declined taking it. Zilley then said he was going to the factory, or Griffith's mills, to sell it to some man there; and if he did not sell it to him, he should get rails and fence it, and live on it himself. He also told Williams, that if he could not get the price he had given for the land, he meant to fence it, and build upon it, and live there himself. The deed was tendered some time in January, say a fortnight after the time mentioned in the article. It was tendered by Mr. Neale, as counsel for Rodman, after it was supposed that some difficulty might be made about completing the contract. Even then, Zilley did not object to the deed; expressed no dissatisfaction that it was not tendered in time. On the contrary, he told Mr. Neale, he was willing to take the property, but was not prepared to do so at that time. He promised to go, on the following Tuesday, to the office of Daniel Wills, and receive the deed, and settle the whole matter. This was agreed to by both parties.

In this case, the *time* of the performance, was not of the essence of the contract; and the rule of this court is, that in decreeing the specific performance of an agreement, time may be dispensed with, if not of the essence of the contract: 7 *Ves. jr.* 273; 4 *Bro. C. C.* 329; 12 *Ves.* 326; 5 *Cranch*, 262; and the case of *Hepburn and Dundas* v. *Dunlap & Co.*, 1 *Wheat.* 204, *in notis.* The court, then, may dispense with the time, and it will do it to promote the ends of justice. But independently of this, the whole evidence shows a waiver of the formality of a tender on the part of Zilley, and he cannot now resort to it for the purpose of defeating the plaintiff's claim. There can be no doubt that a party may waive his technical right in this respect; and I think there can be as little doubt that such waiver was actually made. It need not be direct, or in writing; but may be justly inferred from circumstances that would not have taken place without it.

6. Another objection is, that there is a prior mortgage on the

property, belonging to J. H. Sterling. This point was not pressed at the argument. There is no evidence of the amount of the mortgage. It was stated to be very small, and the statement not denied: and it is proved that the defendant knew of it, and knew that it was prior to his mortgage and judgment. If desired, it may be referred to a master to make the necessary inquiry, as to the amount of the incumbrance, and state of the title, so as the court may judge of them and take such order in relation to them as may be deemed expedient.

7. There is one matter of defence, which was not set up in the answer, but strenuously urged at the hearing, viz. that the contract was waived.

The testimony of Samuel J. Read was relied on to show a parol waiver. I think it fails to do so. Read was the counsel of Zilley in the judgment and execution. Rodman and Zilley were at Mount Holly, and went to Read for the purpose of making a settlement, as he supposed; probably it was the time that Shinn saw them, when on their way to Mount Holly to settle the business, as they stated. In the conversation which took place, Read observed that he thought Rodman had done wrong, and that it was a shame to take advantage of such a poor, ignorant man as Zilley. He further observed to Rodman, that if "Richardson was a real bidder, Amos Zilley had better pay the additional twenty-five cents per acre, and let Richardson have the land; which Zilley agreed to do. Rodman said, if Zilley would give up the land, he would not ask him to lose any thing; which Zilley agreed to do. Rodman then said, he would go right away and let Richardson have it." If I understand the conversation, the meaning of Rodman was not to release Zilley so as to lose the sale of the property, but to lose the extra bid of Zilley, so that Richardson might take the property at his bid. He was willing to lose the twenty-five cents on the acre, if Zilley would agree that Richardson should take it; and this being agreed on, Rodman went immediately to see if Richardson would take it, at his bid. But Richardson did not take it, and thus the matter ended. The waiver of a contract may be by parol, but it should be express, and of such a character as to leave no reasonable doubt as to the intention of the parties.

As to the waiver in writing set up by the defendant, the facts are these. There was due from Zilley to Elizabeth Blakely, one of the defendants, the sum of two hundred dollars. To secure this, Zilley had assigned to Blakely the judgment against Rodman. Having now become the purchaser of a part of Rodman's property, the consideration for which was to extinguish the judgment, he was desirous of procuring the two hundred dollars to pay off Blakely. When he offered to sell to Williams, he said he wanted to make up two hundred dollars, "on account of some writings in somebody's hands." On the 13th February, 1827, about five weeks after the sale, Rodman entered into a written agreement, whereby he undertook to let Zilley have money enough to pay off this claim to Blakely, and Zilley agreed to let Rodman have a mortgage on the thirty-five acres which he, Zilley, had purchased.

So far from being a waiver, this appears to me to be an express recognition of the contract by both parties. This instrument is under seal, and executed in the presence of two witnesses, and cannot be mistaken. If it had been set up as evidence of fraud on the part of the complainant, there might have been some weight in the argument; but it certainly cannot prove a waiver.

8. But lastly, the defendant says the contract is defective, and cannot be enforced: that the articles purported to be articles for the sale of the whole property, whereas only thirty-five acres were sold. The article commences as follows: "Conditions of the vendue, the property of Samuel Rodman, held this 4th day of January, 1827. The highest bidder to be the purchaser," &c. It does not state whether it was real or personal property that was about to be sold, or whether it was the whole or only a part; but the property to be sold was the property of Samuel Rodman. It is clear, however, that it was land only that was sold, and that only thirty-five acres were set up; and there is no pretence in the evidence for even a supposition, that Zilley did not know what he was buying. No complaint of this kind is made at the time of the sale, or at the time of the survey of the land, or at any other time, so far as the facts are exhibited.

It is not necessary to go into further details. The conclusion of my mind is, that the complainant is entitled to the relief prayed for. I have endeavored to examine this case with care and attention; and I was induced to do it the rather, because the result to which I have arrived is variant from my first impressions. There are difficulties in it, I admit, and there may be some disadvantage to the defendant in decreeing a specific performance. But this is to be expected in a greater or less degree in every case of this description. Very few defendants would be brought into this court with a view to compel a specific performance of contracts, if it were not that they supposed such performance would be in some way disadvantageous. If I could have found a safe resting place for the belief that this was a sham auction, and that an actual imposition was practiced on Zilley, who was a man of rather inferior intellect, I should not have hesitated a moment in denying the relief sought. But seeing, from the evidence, that he was a man in the habit of dealing for himself; that he consented to the sale of the property in this way to satisfy the execution; that the sale was an open sale, and in the presence of very respectable persons, who testify that it was a perfectly fair one; that he signed the agreement on the back of the articles, and expressed himself satisfied; that he afterwards repeatedly spoke of the purchase without any reservation, or any charge of unfairness, except perhaps in one instance. And seeing also, that as much as a week after the sale, when he had had time for reflection and advice, if necessary, he took the surveyor down to the land, assisted in running it out, was present at the execution of the deed, made no kind of objections to any part of the proceedings, but promised to settle the matter according to the contract; and seeing, too, that he considered and represented the property as his own, and the deed as made and executed to him; that he endeavored to sell the property, and dealt with it as owner; and lastly, not being satisfied that the contract is unconsciencious or unjust, or that the enforcement of it will be contrary to what is termed the morality of the court, I feel constrained to decree for the complainant.

The assignment of the judgment to Blakely, or the general

assignment to Daniel S. Zilley, cannot alter the principle of the case. The right of Blakely will be protected by the court; and the assignee, taking only the rights of Zilley, cannot be injured.

CITED *in Miller* v. *Chetwood*, 1 *Gr. Ch.* 208; *Ely* v. *Perrine, Id.* 402.

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JOHN PELLETREAU, EXECUTOR OF MEDCEF EDEN, DECEASED, v. JOHN RATHBONE.

Probate of a will granted in one state, cannot be used in the courts of another.

To enable an executor to maintain a suit in this court, it is necessary that the fact of the probate of the will should be stated in the bill.

When that is done, and no objection raised by the pleadings, a probate taken out at any time before the hearing is sufficient.

Alleging in the bill that the complainant "hath taken upon himself the burthen of executing the trusts and duties required of him by the will, and become duly qualified as executor," is not sufficient to show his right to sue in the capacity of executor.

Stating in the bill, that the will has been duly proved in the state of New-Jersey, might be sufficient, without specifying whether such proof was in either of the orphan's courts or before the ordinary.

An original bill was filed by Rachel Eden, as executrix, and also a devisee in trust, under the will of Medcef Eden, deceased, which the defendant answered. Upon the death of the complainant, a bill of revivor and supplement was filed by J. Pelletreau, stating himself to be executor and devisee in trust under the will of the said Medcef Eden, and also administrator of the said Rachel Eden, deceased: which was demurred to for multifariousness. But the bill of revivor corresponding with the original bill, and bringing before the court the persons representing the parties to that bill, and it not appearing that the complainant relied on the supplemental matter, or any claim he might have as devisee in trust, it was held well.

In this case a bill was filed by Rachel Eden, as one of the executors of the last will and testament of Medcef Eden, deceased, and also a devisee in trust under the said will, against the present defendant, for an account and payment of certain rents and profits devised by the said will. To this bill the defendant put in his answer; after which the complainant died. Upon her death the present bill of revivor and supplement was filed by J. Pelletreau, the complainant, stating himself to be

executor and devisee in trust under the will of the said Medcef Eden, deceased, in the bill of the said Rachel Eden set forth, and also administrator of the said Rachel Eden, deceased; and alleging, that in pursuance of the said will of the said Medcef Eden, deceased, he had taken upon himself the burthen of executing the trusts and duties required of him by the said will, and became duly qualified as executor to the said will. The bill contained no farther allegation of the probate of the will, nor any prayer for relief upon any claim the defendant might have as a devisee in trust under the said will.

To this bill the defendant demurred, and to sustain the demurrer relied on the following grounds:—

1. That the complainant, in his bill, had not stated or shown that the will had been duly proved by him in the state of New-Jersey to authorize him in his character as executor to maintain a suit in this court; and,

2. That the bill was multifarious, the complainant having united in the same bill three claims, in different rights and capacities, viz. 1. As executor of Medcef Eden, deceased; 2. As a devisee in trust under the will of the said Medcef Eden, deceased; and, 3. As administrator of Rachel Eden, deceased. The demurrer was argued by

*E. Van Arsdale, sen.* and *S. L. Southard,* for the defendant;

*G. Wood,* for the complainant.

Cases cited:—4 *Mas. R.* 32, 435, 461; 12 *Wheat. R.* 169; 3 *Mas. R.* 472; *Mitf. P.* 126; 2 *Eq. C. Ab.* 4, 5; 1 *John. C. R.* 85; 4 *John. C. R.* 199; 2 *Anst. R.* 469; *Coop. E. R.* 30; 1 *Chit. P.* 200; *Mitf. P.* 53, 55, *s.* 4; *ib.* 63; 1 *Dick. R.* 283; 2 *Mad. C.* 532; 1 *P. Wms. R.* 753; *Toll. Ex.* 46; 1 *P. Wms. R.* 752, 768; 2 *Atk. R.* 120.

The Chancellor. The first ground of demurrer in this case is, that the complainant has not by his bill alleged or set forth that he has duly proved the will of the said Medcef Eden, nor that he has duly qualified as executor to the said will in the state of New-Jersey.

The original bill was filed by Rachel Eden, who alleges herself to be one of the executors of the will of Medcef Eden, deceased, late of the city of New York. She died, and upon her death the present bill to revive was filed by John Pelletreau, also of the city of New York, styling himself "executor and devisee in trust of all the real estate of Medcef Eden the younger, late of Westchester county, in the state of New York; and also administrator of the goods, chattels and credits which were of Rachel Eden, of the city of New York, widow, deceased." The complainant in the bill alleges "that in pursuance of the will of the said Medcef Eden the younger, in the bill of the said Rachel Eden set forth, and herein before set forth, your orator hath taken upon himself the burthen of executing the trusts and duties required of him by the said will, according to the provisions therein contained, and become duly qualified as executor to the said will."

It may be admitted as a principle, and was not at all disputed on the argument, that a probate granted in one state, cannot be used in the courts of another. It is too plain to require illustration: 1 *Cranch*, 258, 282; 3 *Cranch*, 219; 9 *Cranch*, 151; 3 *Mass. R.* 514; 1 *Pick.* 82; *Toller*, 72; 3 *Mason*, 472; 4 *Mason*, 19. The only questions that can be made, are these:

1. Is it necessary to *allege in the bill* the granting of probate?—and if so,

2. Is it properly alleged in the present bill?

On the first point, I am satisfied that it ought to appear by the bill that the party has authority to sue in the character of executor; and that it will not answer to rely on proving the fact at the hearing of the cause. The omission of such allegation has often been the subject matter of a demurrer; and I think, that from the cases themselves, as well as from the reason of the thing, there can be no doubt as to the correct course to be pursued.

In *Humphreys* v. *Incledon*, 1 *P. Wms.* 753, a bill was brought by an executor for the recovery of assets, and it did not appear that he had proved the will. The defendant demurred, because it did not appear by the bill that the plaintiff had proved his testator's will in any court, and Ld. Macclesfield allowed the demurrer; and such was admitted by the register to be the practice of the court.

In later cases of very high authority, the necessity of such an allegation is fully recognized. In *Armstrong* v. *Lear*, 12 *Wheat.* 169, the question arose on a claim under the will of general Kosciuszko; and the court said explicitly, that it was indispensable to the plaintiff's title, to procure in the first instance a regular probate of the testamentary paper in the orphan's court of the District of Columbia, (where the suit was originally brought,) and *to set forth that fact in his bill.* In that case the objection was not taken *in limine* by a demurrer, but at the hearing upon the merits of the case. In *Trecothick* v. *Austin and al.*, 4 *Mason*, 16, the point came up on demurrer, and the opinion of Justice Story is in favor of the demurrer on that ground, although the case was not decided expressly on that point. See also, on this subject, *Picquet* v. *Swan and al.*, 4 *Mason*, 460, 461.

I believe that this question has been up heretofore in this court, in the case of the *Executors of Clymer* v. *James, Ridgeway and al.;* and it was then held necessary that it should appear on the bill that the probate had been granted. I am not sure that the decision did not go further, but what I have stated of it is sufficient for my present purpose.

The old authorities cited at the bar, are not essentially at variance with what I take to be correct principle. In *Fell* v. *Lutwidge*, 2 *Atk.* 120, it appeared upon the investigation that the administration was not actually taken out until after the filing of the bill; yet, having procured it before the cause came to a hearing, it was held sufficient in equity, though not good at law, because the defendant there might crave oyer of the letters. But it is to be considered that *it was charged in the bill* that letters of administration had been taken out, and therefore the complainant was entitled to a demand against the defendant. This was not denied by the answer. The bill was good on the face of it, and the proof necessary to establish the facts charged, was held sufficient in equity, by relation. The case of *Humphreys* v. *Humphreys*, 2 *P. Wms.* 350, is not in point. There a bill was filed for an account of personal estate. The person having the right to administer on the estate was a party, but administration was not actually taken out. The bill was demurred to on

that ground, and the demurrer allowed. Afterwards letters of administration were taken out, and the bill amended; and it was then objected that the matter should have been charged in a supplemental, and not merely an amended bill; and this was the objection that was overruled by the Ld. Chancellor with some warmth. He observes at the same time, *as a dictum*, that where an executor, before proving the will, brings a bill, yet his subsequent proving of the will makes the bill a good one, though the probate was after the filing of it. I presume he must be taken as intending to say, that in all such cases, the bill should allege that probate had been taken out, whether the fact were so or not; otherwise this saying of Ld. Macclesfield would directly contradict his former decision, just quoted. Understanding this dictum as I think it ought to be understood, it is in perfect accordance with all the cases on the subject.

In *Osgood* v. *Franklin*, 2 *Johns. C. R.* it was objected that the complainants produced, as their authority to sue, letters testamentary from the state of Pennsylvania, and that they were of no force in another state. In answer to which, the court remarked, that the production of a probate recently taken out in New-York, cured that defect; and added, that "it seems to be pretty well settled that where no objection is raised by pleading, a probate taken out at any time before the hearing, is sufficient in this court." The same doctrine is held in *Goodrich* v. *Pendleton*, 4 *Johns. C. R.* 549, and *Doolittle* v. *Lewis*, 7 *Johns. C. R.* 51.

The conclusion is, that it is necessary to set forth in the bill the fact of the probate of the will.

The next inquiry is, whether in this case the matter is sufficiently alleged. The complainant says, that he hath taken upon himself the burthen of executing the trusts and duties required of him by the will, and become duly qualified as executor. Now this may all be true, and yet the party have no right to come into this court in the capacity of executor. It appears on the face of the proceedings, that Medcef Eden, the testator, lived in Westchester, in the state of New-York. Rachel Eden resided in New-York. The assets were in that state, and the will was proved there by Rachel Eden. If, then, John Pelletreau, who is also a

resident in that state, has, as he says, become duly qualified as executor, shall he be taken to be duly qualified in New York or New-Jersey? It was easy for him to make the proper allegation, if he had chosen to do so.

The object of requiring the complainant to set out in his bill, that he has proved the will, is a single one; that the court may see he has right to appear there in a representative capacity. It ought, then, to be set forth in such way as to satisfy the court of that fact. It should not be left to inference, especially where the natural and just inference, (as in this case,) would lead to a contrary conclusion. In the case of *Armstrong* v. *Lear*, already cited from 12 *Wheaton*, the court said expressly, that it should appear on the face of the bill, that the will had been regularly proved in the orphan's court of the very district in which the suit was brought; and for the want of that fact appearing, the whole proceedings were arrested.

It has been held unnecessary, in England, to allege in the bill in what court the will was proved. If proved within the kingdom, it will be sufficient. And by parity, if it be stated that the will has been duly proved within the state of New-Jersey, it might be sufficient, without specifying whether such proof was in either of the orphan's courts, or before the ordinary.

I incline to follow the case in *Wheaton;* not only on account of its high authority, but on the plain principle, that if it be necessary to make the allegation at all, (and that it is, I cannot doubt,) it should be made in such way as fully and substantially to answer the objects for which it is intended. In this particular the bill, more especially as a bill of revivor, in which the party is supposed to set out specifically his right to represent the former complainant, appears to me defective; and as to this part of it, the demurrer is well taken, and must be allowed.

The second ground of demurrer is, that the bill is multifarious; and it may be expected that something will be said on that head.

The original bill was filed by Rachel Eden. She was the executrix of Medcef Eden the younger, and also a devisee in trust under the will of said Medcef Eden. Part of the rents and profits demanded in the bill, accrued in the life time of the testator;

and for these it was necessary she should come into the court in her representative capacity. Part of them accrued after the death of Medcef Eden, and could not be recovered by her as executrix, but as devisee. Whether she intended to prosecute both claims in the same suit, and whether if so intending she could legally do it; or whether she intended to proceed as executrix or as devisee, separately, are matters not proper to be inquired into at this time. The question is, whether the original suit is properly revived by this bill of revivor and supplement. I think it is. It is revived by Pelletreau, as executor of Medcef Eden, deceased, and also as administrator of Rachel Eden, deceased. The bill of revivor corresponds with the original bill, and brings before the court the proper persons representing the parties in that bill; and to that there can be no objection.

But it is said, that Pelletreau comes in a character which is not a representative character; that he styles himself not only executor, but devisee in trust of all the real and personal estate of Medcef Eden the younger. That he does so style himself in the commencement of the bill, is true; but I do not find that he relies in any degree in the supplemental part of the bill, on any rights he may have as such devisee in trust. After setting out the facts, that he had become duly qualified to act as executor of the will of Medcef Eden, deceased; and that he had taken out letters of administration on the estate of Rachel Eden, deceased; he states that by virtue of the premises, he has taken upon himself the burthen of executing the said will upon the trusts therein expressed, and hath become entitled to revive the said action, so as aforesaid commenced against the said John Rathbone, by the said Rachel Eden, deceased. He does not state, that under this bill he is entitled to come in claiming originally as a devisee in trust. Whether he will so claim, is a matter which the court cannot now determine; and it would be harsh to allow a demurrer simply on the ground that a party coming properly into court as an executor, had also styled himself a devisee in trust.

It is presumed that the question here sought to be raised, may more fairly and properly be brought up in another stage of the cause, when the views of the complainant shall be more fully de-

veloped, and the court be enabled to discover with precision the grounds on which he seeks to rest his claims.

At present I feel it my duty to say, that, as to the last ground, the demurrer is not well taken; on the first ground, it must be allowed.

Demurrer allowed.

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WILLIAM STEVENSON, AND T. L. WOODRUFF, SURVIVING EXECUTOR OF A. D. WOODRUFF, DECEASED, v. JOHN BLACK.

S. L. Howell executed to S. Whitall six bonds, for two thousand dollars each, payable annually, and a mortgage to secure payment thereof on a part of Hog Island, Delaware county, Pennsylvania. After receiving payment of the *first* bond, Whitall assigned and delivered the *second* bond to W. Stevenson, the *third* and *fourth* to the executors of A. D. Woodruff, and the *fifth* and *sixth*, together with the mortgage, to J. Black; who caused a judgment to be entered up against Howell on one of the bonds, in the common pleas of Delaware county, and an execution to be issued thereon, by virtue of which the mortgaged premises were levied on and exposed to sale by the sheriff, subject, among others, to the following condition: "The above described property is sold, subject to the payment of a mortgage from S. L. Howell to S. Whitall, dated 22d March, 1817, and recorded in Delaware county, in Mortgage book D, page 27," &c. After Black, the plaintiff, bid one dollar for the premises, the sheriff, at the instance of Woodruff, added to the condition these words: "*And the several bonds secured by the said mortgage.*" The premises were struck off to Black at his bid, and he signed the conditions, protesting, however, against the alteration of the conditions, and declaring he would not pay the bonds. This addition to the conditions of sale created no new contract to bind the purchaser personally to pay the bonds held by Stevenson and Woodruff; and their bill, seeking to charge him personally, was dismissed.

The sheriff is bound to sell according to law, and the exigency of his writ; he is not justified in imposing terms on the purchaser different from those imposed by the law. If he undertakes, by any conditions of sale, to vary the relative position of parties, and create liabilities which the law does not impose, he exceeds his authority, and the purchaser is not bound.

On general principles, the purchaser of an equity of redemption is not personally liable for the amount of the mortgage debt; by the purchase and sale the liability is not changed as between the mortgagor and mortgagee; the obligor is still liable to the obligee on his bond, and the obligee or his assignee cannot transfer the personal liability to the purchaser.

As between the mortgagor and the purchaser of a simple equity of redemp-

tion, where the mortgage money constitutes, in fact, a part of the consideration of the purchase; the mortgagor has a right to be indemnified by the purchaser, against all personal liability on the bond.

The uniform language of a court of equity is, that where the purchaser (of an equity of redemption) is in possession and receives the rents and profits, there is raised upon his conscience, independently of any contract, an obligation to indemnify the vendor against the personal liability to pay the mortgage money.

By a mortgagee, or assignee holding one of the bonds secured by a mortgage, becoming the purchaser of the equity of redemption, that part of the mortgage debt due to himself on the bonds he holds, is extinguished.

Is is a general rule, that where there is a bond and mortgage, the assignment of the bond operates as an assignment of the mortgage: the bond is the principal, and the mortgage is the incident.

Where a mortgagee assigns one of the bonds secured by the mortgage, retaining the mortgage himself; the assignee becomes equitably interested in the mortgage to the amount of his debt or bond, and the holder of the mortgage a trustee for the assignee of the bond, *pro tanto*.

But the assignee of the bond has not any claim against the mortgagee, personally, growing out of the transfer of the bond; his claim is upon the mortgage or the estate bound by the mortgage, and that claim remains, no matter in whose hands the estate may be.

The assignee of the mortgage stands, *quoad*, in the shoes of the mortgagee; his rights and liabilities are the same, and not different.

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It appears from the pleadings and evidence in this case, that on the 22d of March, 1817, Samuel L. Howell, of Gloucester county, executed to Samuel Whitall, of the same place, six several bonds, conditioned for the payment of two thousand dollars each, with interest from the 25th day of March then instant. The first of the said six bonds became due and payable on the 25th of March, 1818; the second, in March, 1819; the third, in March, 1820; the fourth, in March, 1821; the fifth, in March, 1822; and the last one, in March, 1823. To secure the payment of the moneys due on these bonds, Howell on the same day executed to Whitall a mortgage, whereby he granted and confirmed unto him, the said Whitall, his heirs and assigns, all that part of Hog Island, in the river Delaware, contained in certain boundaries, in the said mortgage particularly specified.

The first bond was paid and discharged by Howell. In October, 1817, Whitall assigned the *second* bond to William Stevenson, one of the complainants.

In July, 1818, he assigned the *third* and *fourth* bonds to the executors of Woodruff.

In February, 1819, he assigned the *fifth* and *sixth* bonds (being the *two last*) to John Black, the defendant, and at the same time assigned to him the mortgage, which until that time had remained in his possession.

In February, 1823, John Black, in the name of Samuel Whitall, but for his own use, caused a judgment to be entered up on one of the bonds thus assigned to him, in the court of common pleas of the county of Delaware, and state of Pennsylvania; upon which an execution issued in due form of law. By virtue of this execution the mortgaged premises, (or the right of Howell therein,) were levied on, and in October, 1823, they were sold at sheriff's sale, and purchased by John Black, for the sum of one dollar.

It appears that Black attended the sale in person, and bid for the property. One of the articles of sale was as follows: "The foregoing described property is sold subject to the payment of a mortgage from Saml. L. Howell to Samuel Whitall, dated 22d March, 1817, and recorded in Delaware county, in Mortgage book D, page 27," &c. After Black had made his bid, and before the property was struck off, the sheriff was induced, at the instance of E. D. Woodruff, one of the executors of A. D. Woodruff, deceased, to add the following words to the condition above recited: "*And the several bonds secured under the said mortgage.*" Against this addition or alteration, Black objected at the time. He nevertheless completed the purchase, by permitting the property to be struck off to him, and signed the articles of sale, protesting however against the alteration of the conditions, and declaring publicly that he would never pay the bonds.

The sheriff, who was examined as a witness, states, that considerable altercation took place; that Black refused to sign the agreement annexed to the conditions of sale, upon any terms other than those which had been read, and upon which he bid for the property. The sheriff told Black, he did not consider him responsible any further than the conditions bound him at the time of his making the bid; and as to the alteration made at the suggestion of Mr. Woodruff, that Mr. Black and Mr. Woodruff must

settle it between themselves. Black also declared, that if any of the persons interested in the property would come forward and bid for it, it should be again set up for sale.

It further appears, that Black received the sheriff's deed, and went into possession under it, and has since that time been in the receipt of the rents and profits.

The object of the complainants' bill is to charge Black, the defendant, personally and specifically with the payment of the bond assigned to Stevenson, and the two bonds assigned to the executors of Woodruff. The case was argued by

*G. D. Wall*, for the complainants;

*G. Wood*, for the defendant.

Cases cited:—4 *Cow. R.* 278; 1 *Paine C. C. R.* 535; 2 *Gallis. R.* 154; 5 *Wheat. R.* 257; 3 *Pow. M.* 908; 5 *Cow. R.* 202; 3 *John. C. R.* 302, 464, 467; 11 *John. R.* 534; 4 *Pick. R.* 131; 2 *John. Ca.* 441; 2 *Wash. R.* 233, 255; 12 *Mass. R.* 26, 30; 2 *John. R.* 595, 612; 2 *Ves. R.* 692, 765; 1 *Ves. R.* 122; 1 *Pow. M.* 345, 574; *Sugd.* 219-20; 7 *Ves. jr.* 331-7; 3 *Ves. jr.* 128; 3 *Peters' U. S. R.* 293, 305; *Hopk. C. R.* 239; *Pow. M.* 884; 2 *Bro. C. C.* 152; 3 *Atk. R.* 244.

THE CHANCELLOR. If Black be liable at all, *in personam*, it must arise out of the general principles of equity resulting from his situation as a purchaser of the equity of redemption, subject to the mortgage, and being in possession of the mortgaged premises, receiving the rents, issues and profits thereof;—or, it must spring out of some express agreement, whereby he is to be charged, distinct from his liability as a purchaser. Let us examine these grounds, and see whether they will sustain the plaintiffs in their claims.

On general principles, as held in this court, the purchaser of an equity of redemption is not personally liable for the amount of the mortgage debt. By the purchase and sale, the personal liability is not changed as between the mortgagor and mortgagee. The obligor is still answerable to the obligee on his bond, and

the obligee, or his assignee, cannot transfer the personal liability to the purchaser. As between the mortgagor and the purchaser of a simple equity of redemption, where the mortgage money constitutes, in fact, a part of the actual consideration of the purchase, the mortgagor has a just right to be indemnified by the purchaser against all personal liability on the bond. The uniform language of a court of equity is, that where the purchaser is in possession, and receives the rents and profits, that there is raised upon his conscience, independently of any contract, an obligation to indemnify the vendor against the personal obligation to pay the mortgage money; for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage: *Waring* v. *Ward*, 7 *Ves.* 337; *Tweddell* v. *Tweddell*, 1 *Bro. C. C.* 152.

In this case, Black is the purchaser of the equity of redemption at sheriff's sale. He also held two of the original bonds, by assignment from Whitall. On one of these bonds a judgment had been entered up, and his purchase was under an execution on this judgment. He is also the assignee of the mortgage. As it regards that part of the mortgage debt due from Howell to Black, it is extinguished by the purchase. Black purchased the equity of redemption for one dollar. Strictly speaking, the debt remains: but if, as holder of the bonds, he were to resort to his suit at law against Howell, the obligor, for the recovery of the money; it is manifest that as purchaser, and bound to indemnify the mortgagor, he might be immediately prosecuted by the mortgagor and the money recovered back again: *Tice* v. *Annin*, 2 *John. C. R.* 129. This, as the court said in that case, would be an idle and absurd proceeding; and therefore there seems to be no other alternative, than to consider the debt as extinguished in the hands of the purchaser.

But the controversy here is not between the mortgagor and the purchaser. The mortgagor has not been disturbed, nor is he called on to pay the bonds. William Stevenson, one of the complainants, is the holder of the second bond, by assignment from Whitall; and Woodruff holds the third and fourth bonds, also by assignment from Whitall. By virtue of these assignments they claim to have an interest in the mortgage; and insist that

Whitall, after he made the assignments to them, was, as holder of the mortgage, a trustee for them respectively: that consequently they have an equitable interest in the mortgage, and are entitled to be paid. And they further insist, that at the time of the assignment of the mortgage to Black, he had full notice that the three bonds in the hands of the complainants were unsatisfied; and even if he had no notice, yet in equity they have a lien on the mortgage for the satisfaction of their claims. There is no evidence whatever, of any direct notice to Black, that these bonds were outstanding; much less, that they were to be considered as attached to the mortgage. The mortgage, so far from being assigned to the holders of these bonds, was left in the hands of the original mortgagee; and the claim of the plaintiffs upon it, if they have any, is purely an equitable claim.

It is a general rule, that where there are a bond and mortgage, the assignment of the bond operates as an assignment of the mortgage. The bond is the principal, the mortgage is the incident. There are some exceptions to this rule, not necessary now to be noticed. I think the principle will well apply to the case before the court. When Whitall assigned to Stevenson the second bond, retaining the mortgage himself, Stevenson became equitably interested in the mortgage to the amount of his debt or bond; and Whitall, holding the mortgage, was a trustee for Stevenson, *pro tanto*. And so, in like manner, he became a trustee for the executors of Woodruff to the amount of their two bonds. But what rights are conferred by this equitable interest in the mortgage? Had Stevenson and Woodruff any claim whatever against Whitall, personally, (while he held the mortgage,) growing out of the transfer of the bonds? I conceive not. Their claim was upon the mortgage, or the estate bound by the mortgage, and that only. Is, then, Black placed, in any sense, in a different situation as assignee of the mortgage? His rights and liabilities are the same, and not different. He stands, *quo ad hoc*, in the shoes of Whitall. Have they, then, any claim against Black personally, growing out of his situation as purchaser of the equity of redemption? We have seen that by such purchase his own claim was extinguished; but did he thereby make the whole mortgage debt his own, and become *personally liable* to

the mortgagee, or his assigns? I am not able to perceive how such a result is to spring out of the transaction. The claim is upon the estate, not upon the purchaser; and the claim remains, no matter in whose hands the estate may be.

The complainants have not, then, as I apprehend, any such rights against the defendant, growing out of general principles of equity, independent of any special contract, as are set up in their bill. If the suit can be maintained at all, it must be on the ground of the alleged contract entered into at the time of the sheriff's sale. This remains to be examined.

Black certainly was not bound by his bid after the alteration made in the conditions of sale, even if he were before. He might have withdrawn his bid, if he had chosen, and avoided all this difficulty. But he was not bound to do so. He was the real plaintiff in the execution, and of course interested in the sale of the property. It is clear, from the evidence, that Black did not intend to subject himself personally to the payment of the bonds; and such was the understanding of the sheriff. The alteration was made at the instance of Woodruff, not of the sheriff; and the sheriff told Black, before the purchase, that he did not consider him liable, and that he and Woodruff could settle the matter between themselves. But whatever may have been the intention of the sheriff, he was not justified in imposing terms on the purchaser different from those imposed by the law. He was the officer of the law, and as such, bound to sell according to the direction of the law, and not the direction of any interested person. It would be strange, indeed, if it were otherwise. It would be in the power of a sheriff to embarrass, if not wholly defeat, any sale, by the imposition of terms such as the law will not warrant. It is the duty of the sheriff to sell the property according to the exigency of the writ. If he undertake, by any conditions of sale, to vary the relative position of parties, and to create liabilities which the law does not impose, he exceeds his authority, and the party is not bound. What was the sheriff required to sell? Only Howell's right to the property—his equity of redemption. If the purchaser became liable to pay the bonds, a condition of sale to that effect was unnecessary. If there was no such liability, surely it cannot be permitted to the sheriff

to create one at his pleasure, or the pleasure of some person more interested. If he can create one, he can create more, and there would be no limit to his power.

I am clearly of opinion, that there was no new contract created by the additional terms of sale, in favor of these complainants. The property was sold subject to the incumbrance, whatever that might be, in the same way that other property similarly situated, is always sold. The sheriff could only sell and convey the right of Howell, the mortgagor, which was the right to redeem. That was the right purchased by Black, subject to all proper equities; and these are to be ascertained by the known and settled principles of equity, and not by the terms which a sheriff or creditor may, without authority, choose to impose.

But taking up the subject in another point of view, and considering the alteration of the conditions of sale properly made and Black, the defendant, bound by it, does it amount to a special personal contract to pay the money due on the bonds to these complainants? The original articles stipulated that the property would be sold subject to the payment of the mortgage from Howell to Whitall. The addition was, "and the several bonds secured under the mortgage." Does this amount to a special contract with the complainants, so as personally to bind Black for the payment of the money? The sheriff was a public officer, and, strictly speaking, not the agent of any one; or if of any one, it must be of the defendant in execution, whose property he sells, rather than of third persons. May not, then, this contract be considered as enuring to the benefit of Howell, for the purpose of indemnifying him against his personal liability on the bonds? And if so, is there any new duty imposed on the purchaser? Taking the property subject to the incumbrance, equity imposes on him the duty of indemnifying the obligor against personal responsibility; and that is all this contract imports, if considered as made for the benefit of the obligor.

Again, if this is to be considered as a personal undertaking by Black, in behalf of these complainants, to pay the money due on the bonds, the right of coming into this court for relief may well be questioned: such contract can as well be enforced in a court of common law.

What remedy the party complainant may be entitled to elsewhere, or upon other grounds, it is not for the court to determine. It is sufficient to say, at this time, that the relief sought for at the hands of this court, cannot be granted; and the bill must therefore be dismissed, with costs.

Bill dismissed.

CITED *in Merwin* v. *Smith*, 1 *Gr. Ch.* 197; *Hartshorne* v. *Hartshorne*, *Id.* 358; *Tichenor* v. *Dodd*, 3 *Gr. Ch.* 457; *Bolles* v. *Wade*, *Id.* 460; *Morris Canal & Banking Co.* v. *Fisher*, 1 *Stockt.* 697; *Adams* v. *Hudson Co. Bank*, 2 *Stockt.* 541.

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## ISAAC CRANE AND OTHERS v. WILLIAM D. CONKLIN, CALVIN FREEMAN AND JOHNSON WARD.

An ejectment bill, technically so termed, is one brought simply for the recovery of real property, together with an account of rents and profits, without setting out any distinct and substantive ground of equity jurisdiction, which would be demurrable where there is no proper ground of equity.

But a bill to set aside a fraudulent conveyance, filed by those who without the incumbrance of such conveyance are undoubtedly entitled, is altogether different from an ejectment bill, and comes within the ordinary powers of this court.

The bill in this case, filed by the heirs at law, to set aside a conveyance fraudulently and unconscientiously obtained; without any, or if any, a totally inadequate consideration; from a person who from habitual intoxication and being almost incessantly under the influence of liquor, or from debility of body and mind arising from a long fit of intoxication from which he was then just recovering, was incapable of transacting business with discretion, and while he was legally incompetent to make any disposition of his property; was held good, on demurrer.

In this case, an ejectment might have been brought. The title of the heirs is strictly a legal title, and might have been asserted in a court of law. But it does not follow, that because a party may resort to an action of ejectment, he has no remedy in this court. The principle is too broad, and the practice of the court against it. There are many cases in which the jurisdiction of courts of law and equity are concurrent, and the party is at liberty to seek relief in either.

It is a well settled principle, that relief is to be obtained in this court, not only against writings, deeds, and the most solemn assurances; but against judgments and decrees, if obtained by fraud and imposition.

If there has been the suppression of a truth, or the suggestion of a falsehood, whereby a party is circumvented or deceived, equity will relieve against it.

Where undue advantage has been taken of the weakness or necessity of the party; or of any situation in which he is placed, rendering him peculiarly

liable to imposition; this court will interfere. It proceeds on the safe principle, of protecting those whose are not able to protect themselves.

It has become the settled rule of this court, that it will not interfere to assist a person on the ground of intoxication merely; but if any unfair advantage has been taken of his situation, it will render all proper aid.

Inadequacy of price can never be the ground of setting aside a deed, unless accompanied with fraud or misrepresentation; but this is only where the party is able to contract. Where the party was intoxicated, inadequacy of price is direct evidence of fraud.

The fact of the price not being paid, is no ground to set aside a deed. The fraud must be in the original transaction, and not in the non-fulfilment of the contract. But though it does not change the nature of the transaction, it may, if proved, be strong testimony to show its real character.

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The case made in the bill is shortly this: That William M. Crane, late of the county of Essex, being seized and possessed of a considerable real and personal estate, in said county, amounting to the sum of four thousand dollars or upwards, died in April, 1829, aged fifty-five years. That during the months of January and February of the year preceding his death, he was almost incessantly under the influence of liquor, so as to be incapable of managing his business with discretion; and that, when for a few days he refrained from drink, the debility of his body and mind was so great as to render him incompetent to the rational transaction of his concerns. That on the 1st of February, 1828, when he was in a situation legally incompetent to make any disposition of his property, the defendant William P. Conklin, who was a brother of the wife of Crane, and the defendant Calvin Freeman, also a relative of hers, availing themselves of the situation of Crane at the time, fraudulently and most unconscientiously, and without any, or if any, a totally inadequate consideration, procured from him a deed in fee simple for all his real estate. The deed purports to be made for divers good considerations, and for the sum of five dollars, money of the United States. That in order to give color to these fraudulent designs, they executed at the same time to the said Crane and his wife, a certain instrument or agreement, whereby they covenanted, in consideration of the conveyance aforesaid, to pay off and discharge all Crane's debts, and to allow him and his wife during their joint lives, and the life of the survivor, the weekly sum of one dollar

and seventy-five cents, to be paid to the wife of Crane during her life-time, for their use; and if she should first die, then to his use during his life. They were also, by the agreement, to have the use of one room, and a privilege in the garret, cellar, and garden.

The bill then charges, that Crane owed no debts; that the fourteen shillings per week was not paid, or if it was, was paid in liquor of the most pernicious quality. That his wife having died soon after the execution of the deed, he was left in a state of suffering and want, many days going without food, or sustaining himself by the crumbs of charity. That the defendants, Conklin and Freeman, took possession of the property, rented out the house and lands, and took the rents and issues to their own use; and afterwards sold four or five acres of it to Johnson Ward, the other defendant, who purchased with notice of the fraud, and took for his protection a warranty deed.

The complainants, who are the heirs at law of Crane, pray that, under these circumstances, the deed from Crane and wife to Conklin and Freeman, and also the deed from them to Ward, may be deemed to be fraudulent or unduly obtained, and therefore void as against them; that the same may be set aside and given up to be cancelled; and that the defendants may be compelled to re-convey or release the lands to the complainants: *or* that the same may be sold under the direction of the court, and, after allowing to the defendants what may be justly due them, if any thing, that the residue be distributed among the complainants according to their respective rights.

To this bill the defendants have demurred, on the ground that it is simply what is known by the name of an ejectment bill; that the complainants have not shown the existence of any impediment in the way of a proceeding at law, for establishing their title and recovering possession; that the remedy is at law; and that, not having shown any right to relief in this court, they are not entitled to a discovery.

*J. P. Jackson*, for the demurrants. The bill in this case is, substantially, for the recovery of land; to which the complainants claim title, as heirs of William Crane, deceased. It is what

is properly termed an *ejectment bill;* and may be demurred to on that ground. The title of the heirs is a legal title, which may and ought to be tried in a court of law: 1 *Mad. Ch.* 72, (2*d Ed. Hartford*, 201); 3 *Meriv. R.* 172. This court has no jurisdiction to try the title to lands. It cannot determine the validity of a will, either of real or personal estate: 3 *Meriv. R.* 161. There is no one fact or circumstance stated in the bill, that can bring this case within any exception to the general rule. The bill does not state any suit at law, brought or intended to be brought; or pray the aid of the court to enable the complainants to assert their legal title. An heir at law, out of possession, is entitled to a discovery of deeds necessary to support his legal title, or to have *terms* put out of the way which would impede his recovery at law: 3 *Mad. R.* 99. But this bill does not seek for title deeds, nor state any impediment to a trial at law, or that any discovery is necessary. If it had charged, that the defendants had got the title deeds, and mixed the boundaries; and prayed for discovery, possession, and an account; it would, still, have been liable to a demurrer: 3 *Ves. jr.* 3. The plaintiff cannot come here for the possession of the title deeds, until after he has recovered the estate at law: 3 *Mad. R.* 182; *Ch. Williamson's Opin., Vreeland et al.* v. *Demarest et al.* (in this court.)

The bill charges the receipt of rents and profits, and prays general relief; yet the heir cannot file a bill for an account, unless he states an impediment to his recovery at law: 1 *Mad. C.* 189. On a bill for tithes it is not the practice to make decrees, except to assist trials at law: 1 *Mad. C.* 108.

An heir at law has no equity except to remove incumbrances standing in the way of his legal title: 4 *Ves. jr.* 67. A bill by an heir at law out of possession, praying an issue, and stating no impediment to the assertion of his right at law, would be an *ejectment bill*, and not sustainable in this court: 1 *Mad. R.* 110. In the present case, the complainants seek to establish their own title, as heirs at law, and to defeat that of the defendants, by a decree of this court, without stating any impediment to a recovery at law.

Intoxication, or imbecility arising from it, are alleged in the

bill; but it is not stated that this was brought about by the defendants. Without this, deeds obtained from a man in that situation will not, in general, be relieved against: 1 *Mad. C.* 301; 3 *P. Wms.* 130, *n. A.*; 1 *Fonb.* 59, 60; 1 *Ves. sen.* 19.

Mere inadequacy of price is not sufficient to avoid a deed: 2 *John. C. R.* 1; 14 *John. R.* 527: if it was, it is not sufficiently manifest in this case. A voluntary conveyance, or conveyance in fraud of law, is not a nullity, but binds parties and privies: 3 *Mason*, 378; *Jeremy*, 414; 2 *Hals. R.* 173.

Lastly, it is said, the consideration was not paid; but to avoid a deed or other contract on the ground of fraud, the fraud must be in the *original transaction*, and not subsequent fraud: 5 *John. C. R.* 29, 30.

We insist, that the complainants' bill contains no ground of equity, to entitle them to the aid of this court.

*T. Frelinghuysen*, contra. We contend, that this bill is sustained by sound principles of equity. It presents the gross case, of relations availing themselves of the situation of the grantor, either when he was under the direct influence of liquor, or when his mind was greatly enfeebled by a recent fit of intoxication; and obtaining a conveyance of all his real estate, on an insufficient consideration, (which was never paid,) in fraud of himself and his lawful heirs. It seeks to set aside the original conveyance to *Conklin* and *Freeman*, and the deed by them to *Ward*; and that they release; and if they have advanced anything to William Crane, that they may come to an account, and receive payment of what may be due to them out of the lands.

1. In support of this bill, a familiar principle of equity at once suggests itself—that it affords a more certain, full and complete remedy and relief, than any proceeding at law; and this alone will give jurisdiction to the court: *Mitf.* 103, 107. If the complainants have title, in justice, (and the demurrer admits this,) then here are two outstanding adverse deeds, that we have a right, in equity, to put out of the way, that they shall not hang as a cloud over our title. And this relief may be given, while full justice is awarded to the defendants, for any moneys advanced by, and fairly due to them.

2. Fraud *in the transaction*, is the basis of our equity; that the defendants *took advantage of* William Crane's *situation*, and thereby defrauded him of his property. The subsequent *non-fulfilment* of the agreement, is not charged as the ground of our bill; but only as confirmatory of the original design of the defendants, and to complete the history of their misconduct in the matter. The charge of fraud, whether against a deed, or any other contract, agreement or assurance, or against a judgment, decree, or the probate of a will, will sustain the jurisdiction of a court of equity to question it, and relieve against it: 1 *John C. R.* 402, *Reigal* v. *Wood;* 1 *Ves. sen.* 120, 284, 289.

3. This court is not called on to *try the title* to the lands in question, in such a sense as that the defendants can raise an available demurrer to its jurisdiction. We do not seek to try a legal title, but to *try a fraud* in obtaining a pretended title. The case admits, that the deed was given with all legal formalities; that it was regularly signed, sealed and delivered. But it is insisted, that however fair on its face, there is a defect in the procuring it, that should in equity, avoid it. It is no answer, to say, that if it be a fraud, a court of law can try it; for this only establishes a concurrent jurisdiction in a legal tribunal, but does not exclude the right of equity. Besides, a court of equity will relieve, where an unconscientious advantage has been taken of a person's situation, when the circumstances do not amount to fraud in the contemplation of a court of law: 14 *John. R.* 501; 2 *Ves. sen.* 155–6; 13 *Ves. jr.* 51.

4. Although, according to some decisions, a deed obtained from a drunken man will not be relieved against; yet, according to the whole course of decision, if the drunkenness has enfeebled the mind of the grantor, and a conveyance is obtained from him, and especially by his relations, for a small consideration; equity will interfere: 2 *P. Wms.* 203; 3 *P. Wms.* 131, *n.* 1; 2 *Ch. Ca.* 103; 4 *Bro. P. C.* 557; 7 *Bro. P. C.* 70.

5. It is true, as urged by the demurrants, that equity does not try an issue of *devisavit vel non.* But there is a clear distinction between a will and a deed; and the complainants have a right to come here, upon the ground of fraud and imposition, to have

a deed of conveyance set aside and delivered up to be cancelled; 2 *Atk. R.* 324; 2 *Ves. sen.* 627.

6. It is admitted, that mere inadequacy of price is not sufficient to set aside a deed, unless it was gross and palpable. But inadequacy, connected with fraud, imposition, or oppression; or with an undue advantage taken of a weak or a drunken man; or even an embarrassed or distressed man; is sufficient to defeat any conveyance. Hence deeds obtained of *clients*, of *wards*, *heirs expectant*, or *weak men*, if there be not full value paid, are not sustained: 2 *John. C.* 23.

For these reasons, it is submitted, that the jurisdiction of this court in this case is fully established, and that the demurrer ought to be overruled.

THE CHANCELLOR. The bill charges the fraudulent procurement of a conveyance of real estate, and seeks that it may be set aside in favor of the heirs at law.

Two questions are made:

1. Has this court jurisdiction to set aside conveyances, in favor of the heirs at law? And,

2. Does this bill set out such a case as will authorize the court to interfere, if it have jurisdiction?

It must be admitted in this case, by both parties, that an ejectment might have been brought for the recovery of the possession of this property, by the heirs at law. There is no legal impediment or disability standing in the way to prevent the institution of such suit. The title of the heirs is strictly a legal title, and such are properly asserted and maintained in courts of law. But it does not follow, that because a party is at liberty to resort to an action of ejectment, therefore he has no remedy in this court. The principle is too broad, and the practice of the court is directly against it. There are many cases in which the jurisdiction of the courts of law and equity are concurrent, and the party is at liberty to seek relief in either.

Although an ejectment might have been brought at law, yet I cannot concur in the opinion of the counsel of the defendants, that this is what is technically termed an ejectment

bill. Such a bill is one brought simply for the recovery of real property, together with an account of the rents and profits, without setting out any distinct and substantive ground of equity jurisdiction. A bill of this description would be demurrable, and could receive no countenance in this court. It is of great importance in the administration of justice, that the principles of the two courts should be kept distinct; and where there is no proper ground of equity, the chancery will not interfere. Thus in the case of *Loker* v. *Rolle*, 3 *Vesey, jr.* 4, cited by the defendants' counsel, the bill was for a discovery and for possession and an account, stating that the defendant had got possession of the title deeds and mixed the boundaries. The chancellor was of opinion that he had no jurisdiction; that if the complainant had filed his bill for a discovery merely, he would have been entitled to it, but that there was no equity in his case to entitle him to any farther relief. He set out no hindrance or impediment to his legal title, which could be properly removed in a court of equity, nor any fraud which could authorize the court to assume jurisdiction. A similar case is to be found in 3 *Vesey*, 343, *Ryves* v. *Ryves;* and the principle is not confined to cases of real property, but extends to all cases where the demand is purely legal, and the party can have an adequate remedy at law. A bill filed to recover the amount of a total loss on a policy of insurance, stating no sufficient ground of equitable relief, was dismissed with costs: 1 *John. C. R.* 463.

But this is a bill to set aside a fraudulent conveyance, filed by those who, without the incumbrance of such conveyance, are undoubtedly entitled; and I can entertain no question as to the jurisdiction. It is altogether different from an ejectment bill, and comes within the ordinary and often-exercised powers of this court. It is a well settled principle, says Chancellor Kent, that relief is to be obtained in this court not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition: *Reigal* v. *Wood*, 1 *John. C. R.* 406.

In *Clarkson* v. *Hannay and al.*, 2 *P. Wms.* 203, a bill was filed by an heir at law, to set aside a conveyance made by the ancestor. It was made to appear that the ancestor was a weak

man, and easily to be imposed upon, and that the consideration was an annuity of twenty pounds sterling per annum for an inheritance of forty pounds per annum. The court granted relief, and ordered the estate re-conveyed, and the writings delivered up, and that the defendants should pay back the amount of rent they had received, beyond what they had paid for the annuity. So in *White* v. *Small*, 2 *Ch. C.* 101, certain deeds conveying the equity of redemption of certain premises, were ordered to be set aside on the ground of fraud and want of consideration. In *Evans* v. *Llewellen*, 2 *Bro. C. C.* 150, (better reported in 1 *Cox C. R.* 333,) the court went so far as to set aside a deed *improvidently* obtained for an inadequate consideration, though no actual fraud appeared to have been made use of. The case of *Bennet* v. *Vade and al.*, decided by Ld. Hardwicke, 2 *Atk.* 339, is a strong case, and similar to the present. The bill was brought by the plaintiff, as heir at law of Sir John Lee, to set aside the conveyance of his estate to the defendant, suggesting fraud and imposition, and that Vade had an undue influence over him. That learned chancellor had no doubt on the subject of jurisdiction, though it came before him incidentally in the cause; and he not only decreed that the deed should be delivered up to the plaintiff, with costs, but that the possession should be delivered up immediately. In *Cooper's Eq.* 125, it is said that the only case in which fraud cannot be relieved against in equity, concurrently with courts of law, is the case of fraud in obtaining a will, which if of real estate, must be in a court of law, and if of personal estate, is cognizable in the ecclesiastical court.

The case of *Shaftsbury* v. *Arrowsmith*, 4 *Ves.* 65, cited by the defendants' counsel, in which it is decided, that an heir at law has no equity except to remove incumbrances in the way of his legal rights, does not reach the principles of the bill now under consideration. It was a mere question of title, and there was nothing in it involving any principle of equity. The same remark may be made to the case of *Crow and al.* v. *Tyrrel*, 3 *Mad. Rep.* 99: an heir out of possession came into court praying immediate relief, by having the possession of the property delivered up to him, and also the title deeds by which the estate was held. The vice-chancellor held, that if he came into chancery simply

for the possession of the property, the bill would have been clearly demurrable: that he prayed for a delivery of the title deeds did not help him, for the jurisdiction of the court in regard to the delivery of the title deeds, was confined to the person having possession of the estate. If the party recovered the possession of the estate at law, he might then come into equity for the possession of the title deeds.

But it is to be observed, that in those cases the plaintiffs did not come into court complaining of conveyances fraudulently and improperly obtained, and praying to be relieved from their operation. The relief sought was of a character altogether distinct. The correctness of those decisions is not called in question, but they have no relation to the case now before the court.

Entertaining no doubt as to this part of the case, I will merely refer to some authorities to be found in 3 *Cox, P. Wms.* 131, *in notis*, and to a late and valuable treatise on the jurisdiction of this court, by *Jeremy*, pp. 485–6.

The second question is, whether the bill discloses such a case of fraud as will authorize this court to interfere?

Crane is represented by the bill, as we have already seen, to have been for eight or ten years habitually addicted to intemperance: that during the months of January and February he was "almost incessantly and uninterruptedly under the influence of liquor to such a degree as to be wholly incapable of business:" that when he refrained for a few days from immoderate drinking, his debility of body and mind was so great, as to render him incompetent to the rational transaction of any business: that when he was *either* in a state of actual intoxication, or so enfeebled or debilitated in mind, from the indirect influence of a long fit of intoxication, from which he was just then recovering, and while he was legally incompetent to make any disposition of his property, the defendants fraudulently and most unconscientiously, and without any, or if any, a totally inadequate and mere colorable consideration, procured from him the said conveyance. It is not stated that the drunkenness, and consequent disability, originated in any acts of the defendants; no management or contrivance of that kind is charged against them. The question is, whether, under such circumstances, the deed can be relieved against.

Courts of equity have been liberal in protecting against the consequences of fraud, those who from weakness and imbecility are most liable to imposition, and also those who from their relative situation are peculiarly liable to be influenced by artful and designing persons around them. In carrying out their healthful principles, they have proved themselves the guardians of infancy, the protectors of the innocent and unwary, and the fearless and successful exposers of hidden machination and secret fraud. If there has been a suppression of the truth, or the suggestion of a falsehood, whereby the party is circumvented and deceived, equity will relieve against it. Where an undue advantage has been taken of the weakness or necessity of the party, or of any situation in which he is placed, rendering him peculiarly liable to impositions, this court will interfere. It goes upon the safe principle of protecting those who are not able to protect themselves.

It has, nevertheless, been made a question, how far any improvident act, caused by drunkenness or intoxication, may be relieved against; and it has been supposed by some, that if the intoxication was voluntary and not procured, that the party was without remedy. Thus in *Johnson* v. *Madlicott*, decided at the rolls by Sir Jos. Jekyll, in 1734, cited in 3 *P. Wms.* 130, it was expressly stated, that the having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in that situation, for that were to encourage drunkenness: otherwise, if through the management or contrivance of him who gained the deed, &c. the party from whom such deed has been gained, was drawn into drink. So, too, Ld. Coke says: "Although he who is drunk is for the time non compos mentis, yet his drunkenness does not extenuate his offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did at the time." This doctrine of the ancient common law is too harsh to be generally useful, and it contrasts rather unfavorably with the milder and more rational principles of the civil law. "It is evident, (says Pothier,) that ebriety, when it is such as to take away the use of reason, renders the person who is in that condition, while it continues, unable to make a

contract, since it renders him incapable of assent." *Traite des Obligat. pt.* 1, *c.* 1, *s.* 1, *art.* 4. The case at the rolls in 1734, already mentioned, was founded on the principles of the strict rule of the common law. In 1747, the question was made before Ld. Hardwicke, whether it was sufficient to set aside an agreement, that one of the parties was drunk at the time. That learned chancellor thought it was not, *unless some unfair advantage was taken*, which did not appear in that case: *Cory* v. *Cory*, 1 *Ves. sen.* 19. This decision was a departure from the old rule, and grew out of better conceptions of equity. Instead of saying to the wretched victim of intemperance, that the avenues not only of law, but of equity were closed against him, and that he was to be left as an outlaw in society, a prey to the cunning and cupidity of the spoiler; it extended to him the just protection of the court, not for the purpose of setting aside his contract on the ground of his infirmity, or crime, but for the purpose of looking into his transactions, to see whether any advantage had been taken of his unhappy situation. It would not favor ebriety, but at the same time would not permit it to be taken advantage of with impunity. The good sense of this principle has commended itself to every court, and especially to the courts of equity. Hence it has become the settled rule of the court, that it will not interfere to assist a person on the ground of intoxication merely; but if any unfair advantage has been taken of his situation, it will render him all proper aid: *Cooke* v. *Clayworth*, 18 *Ves.* 12.

The bill before me does not seek relief, on the simple ground of intoxication. It charges expressly, that undue advantage was taken of the situation of the grantor, and that the deed was fraudulently obtained. As evidence of the fraud, it relies upon the inadequacy of the price, and states that even that price was not paid. To this it has been answered, that inadequacy of price is not of itself evidence of fraud, and can never be the ground of setting aside a deed, unless accompanied with fraud or misrepresentation. But this is only where the party is able to contract. In the case of *Reynolds* v. *Wall*, 1 *Wash. Rep.* 164, it was held, that where the party was intoxicated, inadequacy of price was direct evidence of fraud; and I think there can be no doubt of the correctness of the decision. It is conceded, that the fact

of the price not being paid, is no ground to set aside the deed. The fraud must be in the original transaction or contract, not in the non-fulfilment of the contract. If the original transaction was valid at the time, it is not rendered invalid by any subsequent act or omission of the defendants. The fact, nevertheless, is well charged; for although it does not change the nature of the transaction, it may, if proved, be strong testimony to show its real character: 5 *Peters*, 279, *Cathcart and al.* v. *Robinson.*

Upon the whole case, without going into any calculation, or giving any opinion as to the adequacy of the price, I am fully satisfied that this bill is, upon the face of it, clearly within the jurisdiction and principles of this court, and that the defendants must be put to their answer.

Let the demurrer be overruled, with costs.

CITED *in Pittenger* v. *Pittenger*, 2 *Gr. Ch.* 161; *Hutchinson* v. *Tindall*, *Id.* 361; *Kloepping* v. *Stellmacher*, 6 *C. E. Gr.* 329.

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## ELIPHALET MILLER AND MARY HIS WIFE, ISAAC B. MILLER, ET AL. v. CHARLES FORD, AND THE ADMINISTRATORS OF SYLVANUS BONNELL, DECEASED.

In a suit in equity, upon a mortgage or other instrument tainted with usury, the defendant may set up the usury, and, if he can prove the facts, may avoid the instrument, according to the letter of the statute.

But when a party goes into court, seeking relief from the operation of an usurious instrument, he must offer to do what equity and good conscience requires at his hands; that is, to pay the sum actually due: and if he omit to make such offer, the defendant may demur.

A. mortgaged five lots of land to B. to secure payment of three thousand seven hundred and fifty dollars, in seven annual instalments. After this, he conveyed the mortgaged premises, and one other lot, to C., *in trust*, to receive and apply the rents and profits, and in case of deficiency to raise money by mortgage, to pay off the incumbrance, and after satisfying that, to pay the net rents and profits to the grantor's daughter M. (wife of E. M.) for her support, until her youngest child attained twenty-one years of age, and then, *in trust*, to convey the premises to M. and her children then living, as tenants in common; upon their paying, or securing, a legacy of one thousand dollars to J. B. F. afterwards mortgaged the trust premises to B. to secure the farther sum of three thousand six hundred and twelve

dollars and ninety cents. Upon the death of B. his administrators filed an original bill against A. and F. for the foreclosure of these mortgages. Upon this bill, after a demurrer overruled, there was a decree, *pro confesso*, and order of reference. Pending the reference, the *cestuis que trust* filed the present bill, against F. and the administrators of B. This bill *charges*, that B. with notice of the trust, fraudulently combined with F. to take the second mortgage, for their joint and equal benefit. That all the money advanced by B. (on this mortgage) was one thousand seven hundred and fifty dollars, of which a great part was misapplied by F. That only four hundred and twenty-five dollars (retained by B. for interest) went to discharge the prior incumbrance; all which was known to B. That by connivance of B. and F., one thousand seven hundred and fifty dollars was included in the mortgage, for money that F. pretended to borrow of himself, as trustee; and that one hundred and twelve dollars and ninety cents was included in the mortgage, over the sum pretended to be loaned: in consequence of which the mortgage was usurious and void. That the present complainants were not made parties to, or acquainted with the proceedings had on the original bill. That the annual value of the premises was one thousand two hundred and seventy-five dollars, which had been received, but not paid over or accounted for by F. The *prayer* of the bill is, that farther proceedings on the original suit may be suspended: that the mortgage from F. to B. may be declared fraudulent and usurious, and be set aside and cancelled; or if any part of the money was borrowed to pay the incumbrance, it may be so applied: and that an account may be taken of the rents and profits, and the same may be appropriated to the extinguishment of the first mortgage, and the balance, if any, paid over to the said M. The bill being verified by affidavit, an order was made, in the nature of an injunction, restraining the complainants from proceeding in the original suit until farther order. The defendants appeared; and to that part of the bill which charges, that the mortgage from F. to B. is usurious, and seeks relief on that head, demurred; upon the ground, that the complainants have not paid into court the amount admitted to have been advanced upon the security of the mortgage, nor offered themselves ready to pay the same. The demurrer allowed.

If the complainants had been brought in as parties defendants to the original bill, they might have set up the defence of usury, and have relied on the letter of the statute. But coming in as complainants, and setting up the defence of usury, the general rule (that they must offer to pay the amount actually due) applies to them.

The complainants in this case were not obliged to tender any precise amount. Part of the money secured by the second mortgage, was properly applied to discharge the interest on the first; thus far the second mortgage is good. If the complainants had offered to pay that amount, with so much more as might appear to be due after the question of fraud is investigated, they would have done what is equitable, and both defences would then have been open to them.

Miller et al. v. Ford et al.

The complainants' offering to pay the amount supposed to be due, would not have been a waiver of the fraud.

Where a party is not entitled to relief, he is not entitled to discovery. The bill, in this case, is for discovery and relief; the demurrer is to both; this is not too broad: you cannot demur to the discovery unless you also demur to the relief.

The order to stay proceedings in the former suit, is correct. This court may control the proceedings of other tribunals, for the purpose of administering more complete justice; it is one of its most valuable powers: it may control its own proceedings to attain the same object.

Notwithstanding an answer was put in by the administrators of B., some of the most important charges of the bill remaining unanswered; they, being merely representatives, having no personal knowledge of the facts, and therefore not admitting or denying them, the order to stay proceedings was continued.

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The bill in this case states, that about January, 1829, Foster Day and Nancy Bonnell, administrators of Sylvanus Bonnell, deceased, exhibited their bill in this court against Charles Ford and Isaac Beach and Mary his wife, to foreclose the equity of redemption of and in certain mortgaged premises, consisting of five lots in the county of Morris. There were two mortgages on the property: the first one was given by Isaac Beach and Mary his wife to said Bonnell, on or about the 10th day of October, 1822, to secure the payment of three thousand seven hundred and fifty dollars. Of this sum five hundred dollars was payable in five years, five hundred dollars in seven years, five hundred dollars in eight years, five hundred dollars in nine years, five hundred dollars in ten years, five hundred dollars in eleven years, and seven hundred and fifty dollars in twelve years from the date of the bond. The second mortgage was given by Charles Ford and wife to the said Sylvanus Bonnell, for the sum of three thousand six hundred and twelve dollars and ninety cents, and was dated on the *1st of December*, 1824. On the *16th August*, 1824, and before the making of the second mortgage, Beach and wife conveyed the premises covered by the first mortgage, and one additional tract, to Charles Ford, in fee simple, in trust, however, among other things to raise money by mortgage or otherwise. The second mortgage, so given as aforesaid by Charles Ford, was upon the premises originally mortgaged, and also upon the additional tract, so conveyed in trust as aforesaid.

Part of the mortgage money becoming due and remaining unpaid, and Sylvanus Bonnell having departed this life, his administrators filed their bill as above mentioned, for a foreclosure and sale of the mortgaged premises. The defendants filed a demurrer to the bill, which not having been set down for argument, was overruled; and in October, 1829, the bill was taken as confessed, and there was an order, as is usual in cases where the whole of the mortgage money is not due, referring it to a master to take an account. Pending this order of reference, the complainants in this suit filed their bill, setting forth, substantially, the following facts:—That the said Isaac Beach was an aged and infirm man, and having considerable property to dispose of, was desirous to provide for the benefit and support of his daughter Mary, being the wife of Eliphalet Miller, and one of the complainants, in such a manner as to place her support and maintenance beyond the control of her husband, who was insolvent, made the conveyance aforesaid of the said six several lots, to the said Charles Ford, in trust, as follows: that the said Charles Ford should lease out the said premises, or any part thereof, and receive the rents and profits, and after deducting taxes, repairs, insurances and reasonable expenses, should appropriate yearly such sum as might remain, to pay off and discharge the incumbrances then upon the property; and in case the rent should be insufficient to pay off the incumbrances, then in trust to raise by mortgage such sum or sums of money as might be necessary to pay off and remove the same; and afterwards to take and receive the rents, issues and profits, and pay over the same to the said Mary Miller for her support and maintenance: and upon this further trust and confidence, that when the youngest child of the said Mary should arrive to twenty-one years of age, that then the said Charles should convey the said premises to the said Mary Miller and to each and every of her children then living, as tenants in common, upon their paying to Isaac Beach one thousand dollars, or securing it upon bond and mortgage. That Ford took upon himself this trust; and that at this time there were no incumbrances on the property except the mortgage from Beach to Bonnell for three thousand seven hundred and fifty dollars.

The bill then further charges, that Sylvanus Bonnell, well knowing of the deed of trust and its conditions, fraudulently combined with Ford to take a mortgage from him on this trust property, for the joint and equal benefit of himself and Ford, and that one half of the money to be secured by the mortgage should belong to and be for the benefit of Ford; that upon this understanding and agreement the said mortgage secondly above mentioned was given by Ford to Bonnell for three thousand six hundred and twelve dollars and ninety cents.

And it further charges, that Ford never did borrow this sum of Bonnell, but that all the money he ever advanced and intended to secure by the mortgage was one thousand seven hundred and fifty dollars; part of which was wrongfully retained by him to answer a certain claim against one Mahlon Bonnell, and other part to answer a certain claim against Eliphalet Miller, both of whom are insolvent. That eight hundred and twenty-four dollars and fifty cents of said sum was paid by said Bonnell to Ford, and by Ford, with the knowledge of Bonnell, paid to Eliphalet Miller, who was at that time insolvent, and appropriated the money to his own use. That no part of the one thousand seven hundred and fifty dollars went to discharge the incumbrance, except four hundred and twenty-five dollars, which was retained by the said Sylvanus on account of interest; and that all this was known to Bonnell.

And it is further charged, that by the connivance of Bonnell and Ford the trustee, the sum of one thousand seven hundred and fifty dollars is included in the mortgage for money that Ford pretended to borrow of himself as such trustee, no part of which was appropriated to the paying off of the only incumbrance there was on the property. That there was included in the said mortgage one hundred and twelve dollars and ninety cents over and above the sum pretended to be loaned, in consequence of which the said mortgage is usurious and void.

It is also further charged, that the premises were of great value, consisting of a flour mill, saw mill and paper mill, and of the yearly value of one thousand two hundred and seventy-five dollars which had been annually received by the said Charles Ford; that no part of the same had been received by the said Mary Miller

for her support and maintenance, and that the said Charles Ford refused to give any satisfactory account. That the complainants in this cause were not made parties defendants in the suit brought by the administrators of Bonnell to foreclose and sell the mortgaged premises, and had no knowledge of the suit except from information derived from Charles Ford, who informed them at the same time that he would put a stop to the proceedings, and make a compromise with the administrators of Bonnell; and they supposed it was effected, and knew nothing to the contrary, until they understood that a decree, ordering the bill to be taken as confessed, had been entered. That the said Charles Ford, being inquired of as to the matter, said, that he wanted to get rid of the trust, and would purchase in the property and then manage it as he pleased. And it is further charged that this is in accordance with the fraudulent agreement originally entered into between the said Charles Ford and the said Sylvanus Bonnell; the ultimate object of which was to promote a sale of the property under color of law, and purchase the same for their joint benefit, to the utter destruction of the complainants' rights, and contrary to equity and good conscience.

The relief prayed for is, that all further proceedings in the original suit may be suspended, and that the indenture of mortgage from Ford to Bonnell may be declared fraudulent and usurious, and that the same may be set aside and delivered up to be cancelled; or if any part of it be actually due, and was borrowed for the purpose of paying off incumbrances, that it be applied to paying off the said first mortgage; and that an account may be taken of the rents and profits accrued since the execution of the deed of trust, and that the same may be appropriated to the extinguishment of the first mortgage, and the balance paid over to the said Mary Miller, &c. &c.

The facts charged in the bill being verified by affidavit in the usual way, an order was issued out of this court in the nature of an injunction, restraining the complainants in the original suit from proceeding therein until the further order of the court.

The defendants have appeared; and to all that part of the bill which charges, that the mortgage given by Charles Ford to Sylvanus Bonnell, was usurious, and therefore avoid, and seeks relief

because of the alleged usury, they demur, on the ground that the complainants have not paid into court the amount admitted to have been advanced upon the security of the said mortgage, nor have they proffered themselves ready to pay such amount. There was also notice given of a motion to discharge the order staying proceedings in the original suit; the argument of which came on with the demurrer, by

*W. Pennington* and *I. H. Williamson*, for the complainants in the original bill, and defendants in the cross-bill, in support of the demurrer.

*E. Van Arsdale, sen.* for complainants in cross-bill.

Cases cited:—1 *Fonb. E.* 25, (*h.*); 2 *Ves. sen.* 489; 2 *Bro. C. R.* 649; 4 *Bro. C. R.* 436; 16 *Ves. jr.* 124; 15 *John. R.* 555; 5 *John. C. R.* 142, 436; 3 *Ves. and B. R.* 14; 2 *Bro. C. R.* 124; *Forrest. Ex. R.* 129; 3 *Merriv. R.* 161; 1 *John. R.* 580; *Eden on Inj.* 16, 89; 1 *Sch. and L.* 115, 142, 310; *Jeremy E.* 503; 2 *Bro. C. R.* 641; *Ca. T. Talb.* 38; 4 *John. C. R.* 125; 2 *John. C. R.* 148.

The Chancellor. The question is upon the demurrer: is it rightfully taken?

The general doctrine on the subject is this: where a suit in equity is brought upon a mortgage or other instrument tainted with usury, the defendant may set up the usury, and if he can prove the facts, may avoid the instrument, according to the letter of the statute. But where a party goes into a court of equity, seeking relief from the operation and effect of an usurious instrument, he must offer to do what equity and good conscience require at his hands, that is, to pay the sum actually due; and if he omit to make such offer the defendant may demur: 1 *Fonb.* 25. Ld. Hardwicke says, in the case of *Henkle* v. *The Royal Exchange Assurance Company*, 1 *Ves. sen.* 317, that whoever brings a bill in the case of usury, must submit to pay principal and interest due, on which the courts lay hold and will relieve; and he lays down the same principle in ex parte, *Skip*, 2 *Ves.* 489. Ld. Thurlow lays it down as a universal rule, *Scott* v.

*Nesbitt*, 2 *B. C. C.* 649; 2 *Cox*, 183: and in *Mason* v. *Garden*, 4 *B. C. C.* 436, which was the case of a cross-bill, he says, that the bill calls upon the defendant to give up the security; it admits the principal due, and therefore ought to offer payment. So Ld. Eldon, in ex parte *Scrivener*, 3 *Ves. and Beam.* 14, holds the doctrine to be, that at law you must make out the charge of usury, and in equity you cannot come for relief without offering to pay what is really due. "The equity cases," says Ch. Kent, "speak one uniform language; and I do not know of a case in which relief has ever been afforded to a plaintiff, seeking relief against usury by bill, upon any other terms." *Fanning* v. *Dunham*, 5 *Johns. C. R.* 122. The same principle is recognized in 1 *Paige C. R.* 429, *Fulton Bank* v. *Beach:* and in *Morgan* v. *Schermerhorn*, 1 *Paige*, 544, it is held that a party who comes to chancery for relief against an usurious contract, must pay or offer to pay the amount actually due, before he will be entitled to an injunction to restrain proceedings at law: and in this court, in the case of *Britton* v. *Lenox*, decided by Ch. Williamson, in January term, 1828, the principle is fully and ably sustained.

Unless, therefore, there is something peculiar in this case, to take it out of the general principle, the demurrer must be allowed. Some things have been urged which deserve attention. And in the first place, it was argued that not only usury, but fraud is charged as against the second mortgage, and that if the complainants were to offer to pay the amount supposed to be due, it would be a waiver of the fraud; that in truth they are unable to admit any thing due. I apprehend this to be a mistake. The complainant is not obliged to tender any precise amount. It appears that a part of the money secured by the mortgage for the benefit of Bonnell, was actually paid, and properly appropriated to discharge the interest on the first mortgage. Thus far, undoubtedly, the mortgage is good. If, then, the complainants had offered to pay that amount, together with so much more as might appear to be bona fide due after the question of fraud should have been investigated, I should say they had done what was equitable, and that both defences would have been open to them.

But it is said the demurrer is too broad; it should have been only to the discovery, and not to the relief. I apprehend the law

differently. When a party is not entitled to relief, he is not entitled to a discovery. The ancient practice is stated to have been otherwise, and it was not until the days of Ld. Thurlow that the present practice was established. In *Morgan* v. *Harris*, 2 *Bro. C. C.* 124, that judge says, "you cannot demur to a discovery, unless you demur to the relief: for then you do not demur to the thing required, but you demur to the means by which it is to be obtained." The rule was followed up by him, in *Fry* v. *Penn*, 2 *Bro. C. C.* 280, and *Price* v. *James*, 2 *Bro. C. C.* 319, and also in *Watkins* v. *Bush*, 2 *Dick.* 663; and has been adhered to in a series of decisions by Ld. Rosslyn and Ld. Eldon, vide *Renison* v. *Ashley*, 2 *Ves. jr.* 459; *Ryves* v. *Ryves*, 3 *Ves.* 343; *Muckleston* v. *Brown*, 6 *Ves.* 63; *Baker* v. *Mellish*, 10 *Ves.* 544; *Attorney General* v. *Brown*, 1 *Swanst.* 294; by Sir Thomas Plumer, vice-chancellor, in the case of *Armitage* v. *Wadsworth*, 1 *Mad. Rep.* 110; and by Sir William Grant, the master of the rolls, in *Jones* v. *Jones*, 3 *Mer.* 161. In the present case, the bill is for discovery and relief. The demurrer is to both; and the objection, that the demurrer is too broad, cannot prevail. The practice is too well settled to be disturbed.

The only difficulty in my mind, on this part of the case, arose from a view of the subject which was not taken in the argument. It is this:—Here was a mortgage upon a trust estate. The bill filed was against the trustee, but not against the cestuis que trust, who were infants and a feme covert, and who are now the complainants before the court. If they had been brought in as parties defendants, they might have set up this defence in their answer, and stood in a very different posture before the court. They might then have rested upon the letter of the statute. But I am not satisfied that their situation was such as to require them to be made parties to the original bill. And coming in as they now do, as complainants, and setting up the defence of usury, I am willing to apply to them the general rule which applies to all other persons coming in a similar way, and asking for similar relief.

I am of opinion that the demurrer is well taken, and must be allowed.

Another question has been raised in this case, on a motion to

vacate the order made in the nature of an injunction, staying further proceedings in the original suit. This order has been termed a novel and unheard of proceeding in this court. Even if it were so, I should have no doubt of its correctness. If this court may control the proceedings of other tribunals, for the purpose of administering more complete justice, (and that is one of its most valuable powers,) I do not see why it may not control its own proceedings, to attain the same object. I believe, however, the principle is not a new one, though perhaps an application of it precisely like to the present, has never before been made. It is not uncommon to stay proceedings on an execution for the sale of mortgaged premises, and that upon motion; and in the case of *Astor* v. *Romayne*, 1 *John. C. R.* 310, the court ordered a sale postponed for six weeks, thereby to give an opportunity for some arrangement, supposing it might be beneficial to all parties. And in the case of *Jesse Baldwin*, complainant, and *Elizabeth Johnston* and *John Y. Baldwin*, defendants, on bill filed in this court, an order very similar to the one in the present case was made in February, 1822, restraining the complainant in a prior suit from proceeding on a certain decree and execution in his favor in this court, until certain matters touching the validity of the mortgage on which the decree and execution was founded, should be properly investigated. That order is still in force, and the second suit having been brought to issue, has been argued before the court, and is now under advisement on its merits.

The propriety of continuing the order, after the answer put in on the part of some of the defendants, is now to be determined. So far as the last mortgage is concerned, I think there can be no doubt as to the propriety of continuing the order. The whole transaction is a very extraordinary one, and calculated to awaken strong suspicion; and this court can never permit the property to be sold to satisfy that mortgage, without an investigation of the facts connected with it. Some of the most important charges remain unanswered. The defendants who have answered, being merely the personal representatives of Bonnell, have no knowledge of them, and therefore can neither admit nor deny them. One charge is, that a large part of the money received by Ford from Bonnell, was appropriated by Ford in direct violation of the

trust, and with the full knowledge of Bonnell, who was perfectly acquainted with the nature of the trust. This is not answered. It will not do to say that if there was any violation of trust, Ford is answerable, and not Bonnell. The charge is, that there was an understanding between them; and such are the circumstances of the case, that in the absence of any denial on the part of the defendants, the complainants should have an opportunity of proving it. The simple fact, that Bonnell consented to take a mortgage on the trust property, from the trustee, for a large amount, with an agreement that half the amount was for the benefit of the trustee himself, without knowing whether the money was actually advanced by the trustee, or how it was appropriated, is sufficient, in my mind, to call for a complete investigation.

I have had some doubt as to the propriety of continuing the order as to the first mortgage. There is much force in the argument, that if Ford has abused his trust, Bonnell should not be answerable, or his estate suffer. But if Bonnell has voluntarily lent himself to any fraudulent schemes of Ford; if he has aided to embarrass the property, and connived at a misappropriation of the very funds that should have been directed to the payment, in part, of his own mortgage, his situation is changed, and he has no reason to complain if he is put to some inconvenience. Seeing the intimate connection that must have subsisted between Ford and Bonnell; seeing that the equity of the bill is not fully answered, even as it regards this first mortgage; and seeing also that Ford, the trustee, has not answered the bill, I deem it advisable to continue the order generally, for the present. Independently of this, the property is an entire property, and cannot be sold in parcels. If a sale takes place, the whole must be sold, and the rights of those ultimately interested in the property may be materially injured.

This course is taken, in the confidence that no unnecessary delay will take place in the prosecution of the suit. The whole case will be at all times under the control of the court, and it will endeavor to shape its course in such way as most effectually to protect and preserve the interests of all parties concerned.

CITED *in Ware* v. *Thompson*, 2 *Beas.* 67; *Giveans* v. *McMurtry*, 1 *C. E. Gr.* 473; *Hudnut* v. *Nash. Id.* 553; *Vanderveer* v. *Holcomb*, 2 *C. E. Gr.* 91; *Metler* v. *Metler*, 3 *C. E. Gr.* 274.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, AT THE RELATION OF DANIEL PETTEE AND JOSHUA SMITH, v. JOHN A. STEVENS, EDWIN A. STEVENS, AND JEREMIAH H. SLOAN.

Where a corporation has been duly organized, and thereby acquired a legal existence, a court of equity will not, upon an alleged *nonuser* or *misuser* of its corporate privileges, declare the charter to be forfeited: such a power is of right to be exercised by a court of law and not a court of chancery.

Where a set of men claiming to be a legally incorporated company under an act of the legislature, have done every thing necessary to constitute them a corporation, colorably at least, if not legally, and are exercising all the powers and functions of a corporation; they are a corporation, *de facto*, if not *de jure;* and this court will not interfere, in an incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers.

The commissioners appointed to receive subscriptions for the stock of an incorporation, are trustees; and as such this court, if a proper case was made, might control their acts: but, to authorize it, there should be some complaint on the part of the stockholders, or persons subscribing or seeking to subscribe for stock; and the proceeding should be by bill, and not by information.

The right to the use of a navigable stream is a right common to all the people of this state. Before the revolution, this right was in the crown: the people are now the sovereign power, and this right is vested in them. It is their property, and, as such, may be disposed of for the common benefit, in such way as they may see fit. This disposition can only be made by the legislature of the state, which is the rightful representative of the people: and where such disposition is made, "consistently with the principles of the law of nature, and the constitution of a well ordered society," it must be considered valid.

The power of the legislature is not omnipotent; it has boundaries beyond which it may not pass. It cannot authorize private property to be taken for public use, without providing for a just remuneration; and in regard to those public rights which appertain to the citizens generally, a common property, it cannot make such disposition of them as entirely to defeat the citizens of their common rights.

This power is not confined to cases only, where no possible injury would accrue to any individual. In every case, some inconvenience must accrue to individuals, or some privileges be measurably impaired: yet if such disposition or regulation (of the common right) be for the common benefit; if the situation of society and the wants of the public require it, individual convenience must yield, and that upon the most obvious principles of the social compact.

The Attorney General v. Stevens et al.

The surveyors of the highways and chosen freeholders are vested with a general authority, by statute, to lay out and cause to be opened public highways: but this general power must be construed reasonably. "A navigable river is of common right a public highway; and a general authority to lay out a new highway, must not be so extended as to give a power to obstruct an open highway already in the use of the public." Hence it has always been considered necessary, when a bridge was required over a navigable stream, to procure a special act of the legislature: their right to grant such power is beyond dispute.

There is not, in the charter of the Camden and Amboy Railroad and Transportation company, any specific grant of power for this particular bridge, (over South river.) But there is a special authority to erect bridges and all other works necessary for the completion of this particular road. The conclusion is, that the power to construct bridges over all the streams on the route, so as best to carry into effect the object of the incorporation, is given in the act, if not in express terms, yet by necessary implication; and the grant thus made is constitutional.

The power must, nevertheless, be exercised discreetly, and with a due regard to the privileges of others. If any injurious and wanton exercise of it be shown to this court, it will interfere and regulate it on proper principles. To warrant such interference, the exercise of the power must be shown to be, not only injurious, but wilfully or wantonly so; a mere mistake in judgment will not be sufficient.

The word *survey*, does not necessarily, *ex vi termini*, mean a *map* or profile: they are sometimes used as convertible terms, not always. The books filed by the Camden and Amboy Railroad and Transportation company, in the office of the secretary of state, containing a description (in words and figures) of the commencement of the road, the different stations made at the time of the survey, the courses and distances between those stations, and the number of stations, to the termination of the road, is "*a survey*" within the meaning of that provision of the charter which requires, that "a survey of such route and location (of the road) shall be deposited in the office of the secretary of state;" at least so far forth as to warrant the court in refusing an injunction on the ground that no survey whatever has been made. Injunction refused.

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In this case an information was filed in the name of the Attorney General, (at the relation of Daniel Pettee and Joshua Smith,) against the defendants, to restrain the Camden and Amboy Railroad and Transportation company, and the defendants acting under their authority, from erecting a bridge, on the route of said road, over South river, a navigable stream in the county of Middlesex. The grounds charged in the information, and relied on in the argument, were; 1. That the stock of the company was not legally subscribed according to the terms of the charter;

the commissioners, by their secretary, having subscribed for the whole of the stock, in the names of themselves and their friends, upon the first opening of the books; and immediately thereafter closed the books, and refused to permit other persons to subscribe who were present and desired to subscribe at the time, and also refused to open the books and permit others to subscribe on subsequent days, and at other places, when and where they had given notice that the books would be open to receive subscriptions; in consequence of which, it was insisted that the subsequent organization of the company, by choosing directors, and their proceedings, was void; and that the company, not having been duly organized, had no legal existence, and were not authorized to act as a corporation. 2. That the company had no express authority given them by the charter, to erect bridges over navigable streams; and if such a power was given, the grant was unconstitutional and void: And, 3. That a survey of the route and location of the railroad had not been made and deposited in the office of the secretary of state, pursuant to the direction of the charter: that the making and filing of the survey in the secretary's office was a condition precedent, without the performance of which the proceedings of the company were void.

The defendants put in their answer, and depositions and proofs were taken and read on the motion for the injunction. The facts appear more fully in the opinion of the court.

*W. Halsted*, for the relators. 1. South river is a navigable stream and public highway. This has been recognized by the legislature, in the act of 1816, incorporating the Bordentown and South Amboy Turnpike company, and the acts of 1817 and 1819, authorizing them to build bridges over Crosswicks creek and South river. The highest authority on this subject is to be found in *Leam. and Spi. N. J. L.* 390. All streams are considered navigable where the tide ebbs and flows: 1 *Halst. R.* 75. In South river the water rises from three and a half to six feet. The stream may be navigated with sloops of from twenty to thirty tons burthen. It is not material that the old channel has filled up; there is a new and better one opened: *Ang. on W. C.* 96. The right of navigation is protected by the act of 1755.

This cannot be repealed by implication. The right may be regulated, but not impaired: 1 *Halst. R.* 75. Every obstruction to a navigable stream is a public nuisance: *Eden on Inj.* 161; *Jacob L. D. Nuisance*; 5 *Bac. Ab. Nuisance, A.*; 19 *Vin. Ab.* 244; *Noy.* 103. This court will interfere in a plain case of nuisance: *Eden on Inj.* 157, 162; 2 *Ans. R.* 603; 3 *Atk. R.* 21, 750; 5 *Ves. jr.* 29; *Amb. R.* 158; 2 *Cox R.* 87. Every navigable stream is a public highway: *Ang. W. C.* 17; *Camp. N. P.* 517; 4 *Vin. Ab.* 503; 19 *Vin. Ab.* 244.

If South river be a navigable stream and public highway, the power to lay out a new highway must be so construed as not to interfere with it. To authorize such interference, there must be some specific provision in the charter: 2 *Mass. R.* 489; 10 *Mass. R.* 70; 1 *Pick. R.* 180. There must be express authority to take away private rights: 4 *Mass. R.* 125. The powers given to the Camden and South Amboy Railroad company, in their charter, are general; there is no express authority to erect bridges over navigable streams.

2. Another question arises, whether this company ever had legal existence, or authority to act as a corporation? It is not a question of *misuser, nonuser*, or forfeiture, that could not be tried in a court of equity; 19 *John. R.*; but the question is, whether they have any corporate rights: 4 *Wheat. R.* 691. The charter of the company is not a close charter. They are not incorporated by the act. The franchise is in abeyance; the corporate powers do not attach until certain conditions are performed. Commissioners are appointed, who upon giving thirty days' notice of the times and places, were to open books to receive subscriptions for the stock, and upon a certain amount of stock being subscribed, the company was to be organized, when the subscribers become the corporation. Has this been legally done? Notice was given that books would be opened on three successive days, at different places. By the charter every citizen that chose had a right to subscribe; but the commissioners, contrary to their duty, disposed of the stock before opening the books; and when they were opened, by their secretary, subscribed for the whole, in the names of themselves and their friends; then closed the books and refused to permit others to subscribe, who attended and offered to subscribe.

*Jobs* offered to subscribe at Hightstown, and *Black* the next day at Mount Holly, and tendered the first instalment; but they were refused the privilege. This is a fraud on the law. The stock has never been legally subscribed, and the subsequent organization of the company is void. The commissioners are trustees, and if they have violated their trust, or acted fraudulently, this court will interfere: 1 *Hopk. R.* 587.

Again: This company, before they proceed to form their road, are expressly required to file in the secretary's office, "a *survey* of the route and location of the road." This has not been done. They have filed a *book*, containing field notes of stations, of courses and distances, in words and figures; and even these almost unintelligible, with many erasures and corrections, not noticed in the certificate annexed, so as to operate as a check against future alterations; without any map or representation of streams, monuments or objects on the route. This does not satisfy the law. A "survey," means a map or profile, exhibiting a view of the route of the road, with reference to natural or artificial monuments or objects, by which it might be traced, and ought to be as perfect and free from erasures and interlineations as a deed, because under this the company acquire title to the lands. Yet even the witnesses differ in opinion, whether this is a survey or not. It is of no use for any practical purpose, and certainly cannot be such a survey as the charter contemplated; without which the company have no authority to proceed in forming the road or erecting the bridge.

*G. Wood*, for the defendants. The grounds of relief charged in the complainants' bill are not sustained. They say, the commissioners subscribed for the whole stock. They undoubtedly had a right to subscribe for any amount of stock they pleased. By the evidence it appears, that *Jobs* waited until all the stock was taken before he offered to subscribe, and that *Black* was told all the stock was subscribed, after which he made no farther offer. It is said the books ought to have been kept open three days, according to the notice. This was not necessary. The commissioners were not bound to receive subscriptions for more stock than there was to be taken. The case in *Hop. R.* does not

support the position: it only proves, that when an excess of stock is subscribed, the court may interfere to regulate its distribution. Suppose this proceeding of the commissioners irregular, who has a right to complain? Certainly none but the parties injured; those who offered to subscribe and were refused. *Jobs* and *Black* make no complaint here: they waive, then, their right; and surely Smith and Pettee, who never offered to subscribe, cannot bring this matter before the court, in an incidental way, after the stock is all subscribed, and the company organized and going on with their work. But if Smith and Pettee can come in, and the manner in which the stock was subscribed is an objection, it does not present the case of a void corporation, or one not organized. The stock has all been subscribed, and the company organized, colorably at least. They are a corporation, de facto, and entitled to go on, and act, until their rights are taken away, which can only be done by a regular proceeding in a court of law. A court of equity will not undertake to treat such a corporation as a void corporation.

But it is the attorney general who complains; he is the officer of the government; they have waived all objection. The legislature have passed two acts, recognizing the validity of these proceedings; by one they have agreed to take a larger portion of the stock, and by the other have married this corporation to the Delaware and Raritan Canal company.

As to the survey of the route; the word *survey*, here, means such a description of the route, as that it may be ascertained and traced, should occasion require. This is best given in words or figures, expressing the number of stations, and the several courses and distances, from the beginning to the end of the route. Without this a map or profile would afford no aid. A survey of lands, under the proprietors of New-Jersey, does not mean a map, but a description in words, to be recorded in a book. Yet, if the survey be defective, a court of equity will not, on that ground, interfere to arrest the proceedings of the corporation.

The remaining ground is, the obstruction to the navigation of the river. The right of location is in the directors; they may pass over all lands and waters that may be necessary, and erect bridges. This power is not restricted, like that of the board of

freeholders, to the erection of bridges over streams not navigable. The charter authorizes the making of the road, which cannot be done without passing over navigable streams; and the power to erect bridges over them, is conferred by the nature of the grant, to be exercised, it is true, with all due regard to the rights of others. If this stream was navigated by *sloops*, it would be proper to put a draw in the bridge. But it appearing from the evidence that it is only navigated by *scows*, that is unnecessary; and especially as there is now a permanent bridge over the same stream, on the route of the turnpike, but a few rods below. The power thus granted is not unconstitutional. The right is in the legislature; it is an incident of sovereignty, not divested by the state or federal constitutions. You cannot, it is true, take private rights for public use without just compensation. It is otherwise with a right of way, or navigation, which is public property: 2 *Peters' U. S. C. R.* 412, 414. Having the power, the company are exercising it discreetly. It is said, they might have crossed the river higher up; but it appears this route is the shortest and best. This court will not control the directors in the exercise of their discretion, unless it is wantonly used: 1 *John. C. R.* 18. What is the injury apprehended? The navigation will not be destroyed, but subjected to some little inconvenience. This is the case with the bridge over the Raritan at New-Brunswick, and bridges over every navigable stream. Yet the power to authorize their erection cannot be questioned.

The Chancellor. This is an information filed by Daniel Pettee and Joshua Smith, in the name of the Attorney General of the state, for the purpose of obtaining an injunction to restrain and prevent the defendants, who profess to act under the authority of the Camden and Amboy Railroad and Transportation company, and also to restrain the said company, from erecting a certain bridge over South river, in the county of Middlesex. It is alleged, that South river is a navigable stream; the tide ebbing and flowing at the place where the bridge is sought to be erected: that it is, of course, a public highway, and not subject to hindrance or interruption by the said company, or any persons pretending to act under their authority. The mode of proceeding adopted in

this case, is founded on the idea, that the erection of a bridge across this navigable stream would be a public nuisance, and that at the instance or information of the proper law officer of the state, this court may interfere to prevent the erection of the nuisance by injunction.

The relief is prayed for on two grounds:

The first is, that the Camden and Amboy Railroad and Transportation company, under whose authority the defendants claim to act, has no legal existence, inasmuch as the terms of the act of incorporation have not been complied with, and consequently that the proceedings of the company are void.

The second is, that no express authority is given by the charter to the company, to construct bridges over navigable streams of water, and that such a power cannot be exercised upon implication merely; and moreover, that if such power be given, the grant, as to that, is unconstitutional and void.

Upon the first point, the material charges in the information are these: that sometime after the passing of the act of incorporation, the commissioners named in the act caused public notice to be given, that books of subscription to the capital stock of the company, would be opened at the house of David Perrine, in Hightstown, on Tuesday the 30th day of March; at the house of Griffith Owen, in Mount Holly, on Wednesday the 31st day of March; and at the house of Isaiah Toy, in Camden, on Thursday the 1st day of April: that the books would be opened at ten o'clock each day, and that five dollars on each share subscribed should be paid at the time of subscribing. That the stock was in great demand, and many persons attended at Hightstown for the purpose of subscribing for stock; but that the commissioners subscribed for the whole of the capital stock themselves, either in their own names or the names of a few of their friends; and immediately after the said commissioners had thus subscribed, they closed the subscription books, and informed the persons who applied to them for stock in the said company, that the stock was all subscribed and the subscription books closed, and refused to permit them to subscribe. That the next day, many persons attended at Mount Holly, and applied to the commissioners for leave to subscribe, but the commissioners refused;

and particularly one John Black offered to subscribe, and tendered in specie the first instalment upon the shares he asked leave to subscribe for; that the said commissioners refused leave to the said John Black to subscribe for any of the said stock, but offered to sell him stock for an advance upon the par value, which Black refused to give. That notwithstanding the illegal manner in which the said stock was subscribed, the commissioners have undertaken to organize the said company according to the provisions of the said act of incorporation.

All the facts charged have not been fully sustained; but it sufficiently appears from the answer and depositions filed, that the stock was all subscribed and taken, on the first day, at Hightstown: that while there, no person wrote in the book of subscription but the secretary of the commissioners. It was evidently understood by the commissioners, who were to be permitted to subscribe and receive stock; for when the secretary had made an end of subscribing for himself, and the other commissioners, and those whose names were given by them or some of them, it turned out that the precise amount was taken, neither a share more nor a share less; whereupon the books were closed, and no person after that was permitted to subscribe.

It has been held, that where a corporation has been duly organized, and thereby acquired a legal existence, a court of equity will not, upon an alleged nonuser or misuser of its corporate privileges, declare the corporation to be forfeited; that such power is of right to be exercised by a court of law, and not a court of chancery. And although this doctrine, as laid down in *Slee* v. *Bloom*, 5 *John. C. R.* 366, was subsequently overruled by the court of errors in the state of New-York, yet it has been recognized in at least two several instances in this court, and appears to me to be the safe rule for a court of equity. The information in this case seeks to avoid that principle. It does not bring the company into court and proceed against them as duly incorporated, but it proceeds against certain individuals, and sets up that the Camden and Amboy Railroad and Transportation company, under which those individuals claim to act, has not, and never had legal existence; that the stock was never subscribed for according to law, and that all subsequent proceedings are void.

The object appears to be, to bring before the court the question whether the commissioners, who were appointed in this case by the legislature to receive subscriptions, and to do those preliminary acts which are necessary for the proper organization of the company, acted in compliance with the law and in good faith. As to their power and authority, derived as it was from the legislature, its legality has not been questioned.

It is proper to inquire in this place, how far this court will undertake to look into these matters, thus incidentally brought before them, and decide upon their illegality or irregularity. This information is filed by the Attorney General, for the purpose of restraining certain persons from erecting a bridge over South river, on the ground that it is a public highway, and that the erection of a bridge over it would be a nuisance. These persons are acting under the authority of a corporation, organized under colour of law. The court is asked to infer, from the facts shown, that there is no legal corporation in existence.

I am not satisfied under existing circumstances, and with the facts before me disclosed by the information itself, that it is the province of this court to interfere in the manner desired. It appears by the information, that the shares of the company have been all subscribed in the manner therein stated; that upon due notice given, the stockholders have appointed their directors; that a survey of the proposed road has been made by the company, and that the erection of the road is in progress. Here, then, is a set of men claiming to be a legally incorporated company under the act of the legislature, exercising all the powers and functions of a corporation. They are a corporation *de facto*, if not *de jure*. Every thing necessary to constitute them a corporation has been done, colourably at least, if not legally; and I do not feel at liberty, in this incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers. It has been seen that the court will not do this where a corporation properly organized has plainly forfeited its privileges; and there is but little difference in principle between the two cases. In both the corporation is actually in existence, but whether legally and rightfully so is the question. And it appears to me, that if the court can take cognizance of the matter in this

case, it must in all others where it can be brought up, not only directly but incidentally.

The case of *Meads* v. *Walker*, *Hopk. R.* 587, relied on in support of the information, is very different from the present. An act had been passed by the legislature of New-York, to incorporate the President, Directors and Company of the Commercial Bank of Albany; and the question was as to the conduct of the commissioners in apportioning the stock among the subscribers. The bill was filed by some persons who had subscribed for stock, but received none; and it was filed against the commissioners, and before any election was had for directors of the company. The proceedings were in *esse* and unfinished; the company was not organized, and had no existence either in law or fact. In that case the court granted an injunction to prevent the election of directors, until a more just apportionment should be made of the stock subscribed. A similar case is to be found in 1 *John. C. R.* 18, impeaching the conduct of the commissioners under the act for the incorporation of the Catskill bank. An injunction was granted on a bill filed before the election of directors.

The persons aggrieved, if there are any such, have made no complaint before this court. They are not here, seeking to have the alleged fraudulent acts of the commissioners set aside, and their own rights declared and protected. If they had presented themselves here at a proper time, or were now here, the question sought to be raised by this proceeding might with some propriety be considered. It is admitted, as contended for on the part of the information, that the commissioners were trustees, and that as such this court, if a proper case were made, might control their acts; but to authorize it, there should be some complaint on the part of the stockholders, or persons subscribing or seeking to subscribe for stock; and the proceeding should be by bill, and not by information. This information, although against individuals named, is in effect against the Railroad company, charging them with an illegal exercise, if not an usurpation of power. Under this view of the case, I deem it unnecessary for me to inquire, whether the conduct of the commissioners was regular and lawful, or otherwise, in permitting the subscriptions to be made in the manner they were, and in neglecting to open the books at all

the places mentioned in the notice. The corporation is now organized, and if acting without authority, is liable to be brought at any time before a competent tribunal, in a mode, the legality of which cannot, as I apprehend, be questioned.

The second ground for relief is, that the company have no express authority given them to erect bridges over navigable streams; and that if such power be given, the grant of it is unconstitutional and void. In either case, it is contended, an injunction should issue.

If a grant of that kind be unconstitutional and void, it will not be necessary to examine whether it has been made or not. Is it, then, unconstitutional?

South river, at the place where it is contemplated to erect a bridge, is a navigable stream. The tide ebbs and flows, as it is proved, from three and a half to six feet, and the stream is navigated by boats or scows. There is one landing place above the proposed site of the bridge, and some trade is carried on to that landing. The right to the use of this navigable stream is a right common to all the people of the state. Before the revolution, the right was in the crown. The people are now the sovereign power, and the right is vested in them. It is their property, and as such may be disposed of for the common benefit in such way as they may see fit. This disposition can only be made by the legislature of the state, which is the rightful representative of the people. And when such disposition is made, "consistently with the principles of the law of nature, and the constitution of a well ordered society," it must be considered valid. Such, as I conceive, has ever been the sound construction of the legislative power, and its exercise has been in perfect accordance with it.

The power of the legislature is not omnipotent. It has boundaries beyond which it may not pass. It cannot authorize private property to be taken for public purposes, without providing for a just remuneration. And in regard to many public rights which appertain to the citizens generally, it cannot make such a disposition of them as entirely to divest the citizens of their common property. But it does not follow from this, that the legislature has power to dispose of those common rights, only in cases where by such disposition no possible injury

would accrue to any individual. Such a power would be nugatory There is scarcely a supposable case in which it could be exercised. In every case some inconvenience must accrue to individuals, or some privileges be measurably impaired. Yet if the disposition or regulation be for the common benefit; if the situation of society and the wants of the public require it, individual convenience must yield, and that upon the most obvious principles of the social compact.

The relators are owners of property, and interested in the landing above the site of the bridge. They have, unquestionably, a common right to the navigation of the stream, and they now navigate it with scows. A bridge placed across the stream below the landing, must necessarily affect the navigation in a greater or less degree, but it would not destroy it. It would occasion some additional trouble and expense, or some additional delay and risk; but the right, though somewhat impaired, would still remain. Such is the case in all similar instances, where bridges are authorized over navigable streams—such as the Passaic, the Hackensack, the Raritan, the Rancocas, and others.

The right of the legislature to make the grant, is beyond dispute. It remains to be considered, whether the power to erect a bridge over this navigable stream is conferred by the charter.

There is certainly no power given, in express terms, to place a bridge over *South river*, or any other of the navigable streams on the route of the road.

The eleventh section of the act, invests the company with full power to survey, lay out and construct, a railroad or roads, with all necessary appendages, from the Delaware river, at some point or points between Cooper's creek and Newton creek, in the county of Gloucester, to a similar point or points upon the Raritan bay. And it enacts, that when the route and location of such road shall be determined upon, and a survey of such route and location deposited in the office of the secretary of state, then it shall be lawful for the company to enter upon, to take possession of, hold, use, occupy and excavate, any such lands, and to erect embankments, bridges, and all other works necessary to lay rails thereon, and to do all other things which shall be suitable and necessary for the effectual completion of the said road or

roads, and to carry into full effect the objects of their incorporation.

This section gives the power to erect bridges generally, where they may be necessary. It makes no distinction between bridges over navigable streams, and streams not navigable; and unless it can be clearly shown that the grant of a power to erect a bridge over a navigable stream, is to be in some certain and specific form, I should incline to think it given by this section. It was argued, and with great force, at the bar, that this general authority, as it was termed, to erect bridges, did not include the power to place a bridge over a navigable stream or public highway; and the case of the *Commonwealth* v. *Combs*, 2 *Mass. Rep.* 489, was relied on in support of the doctrine. The law of that case is sound, but it has no application to the one now before the court. A *Certiorari* had been sued out, to remove a record of the court of sessions, respecting the laying out of an highway. C. J. Parsons, in delivering the opinion of the court, says, "The statute gives a general authority to the sessions to lay out highways, but the statute must have a reasonable construction. The authority, therefore, cannot be extended to the laying out of an highway over a navigable river, whether the water be fresh or salt, so that the river may be obstructed by a bridge. A navigable river is of common right a public highway; and a general authority to lay out a new highway, must not be so extended as to give a power to obstruct an open highway already in the use of the public." The same doctrine is applicable to our surveyors of highways or chosen freeholders. They are vested with a general authority by the statute, to lay out and cause to be opened public highways; but this general power is to be construed reasonably, and with reference to the rights of others. Hence it has always been considered necessary, when a bridge was necessary over a navigable stream, to procure a special act of the legislature. But the power given to the company in this case, is very different from that vested in the surveyors of the highways under the general road act. It is a special power, for certain and specified purposes; not a general authority growing out of a public statute, and to be exercised or not, as occasion may require. There is not, it is true, any specific grant of power to construct this particular bridge;

but there is a special authority to erect bridges and all other works necessary for the completion of this particular road. If this were not so; if the privilege of erecting bridges over the navigable streams on the route, depended on some subsequent grant of the legislature, the operations of the company would be liable to be arrested at any moment, and the franchise would, of course, be incomplete and comparatively useless.

Again; the power appears to flow legitimately and conclusively out of the very nature of the grant. The road is to commence below the mouth of Cooper's creek, and between it and Newton creek, and terminate upon the Raritan bay. In taking this route, it is necessary to cross several navigable streams. Cooper's creek cannot possibly be avoided, without great and unreasonable circuity. The same is true in regard to Pennshawkin, Crosswicks, and Rancocas; and this being the case, and at the same time a matter of notoriety, can it be supposed that the legislature intended to say to the company, you may build your railroad from place to place, at a great expense, but you shall not be permitted to connect the different parts of it by necessary bridges over the navigable streams, without further power from us, to be granted at some future day, at our pleasure? Is it not more reasonable to conclude, that when the legislature gave the authority to erect such bridges and other works as might be necessary for the completion of their road, they intended to convey the right of constructing all bridges on the route of their road, as well those that crossed navigable streams as those that did not? Nay, is not such conclusion necessary for the safety of the company?

The rule, as contended for at the bar, that there ought to be express words to take away vested privileges, is too narrow. In the case referred to, *Coolidge* v. *Williams*, 4 *Mass. R.* 145, C. J. Parsons gives the true principle: "Private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights and privileges of others, unless such construction results from express words, *or from necessary implication.*" In that case, he said, a reasonable effect could be given to every part of the statute without such construction. In this, I do not see how it is possi-

ble to give a reasonable effect to the charter, without giving the power contended for. Any other would leave the company at the mercy of future legislatures, and in a situation of great uncertainty.

The result is, that this power to construct bridges over all the streams on the route, so as best to carry into effect the object of the corporation, is given by the act; if not in express terms, yet by necessary implication; and that the grant thus made is constitutional.

The power must, nevertheless, be exercised discreetly, and with a due regard to the privileges of others. If an injurious and wanton exercise of it be shown to the court, it will interfere and regulate it upon proper principles. To warrant such interference, the exercise of power must be shown to be not only injurious, but wilfully or wantonly so. A mere mistake in judgment will not be sufficient: *Haight and al.* v. *Day and al.*, 1 *John. C.* 18. That must be remedied at law. In this case I do not find any thing like a wanton exercise of power. The company propose to build a bridge over South river, on what the engineer states to be the nearest and best route. Below the spot where the bridge is to be built, there is already a permanent bridge over the same stream, authorized by an act of the legislature. This was originally a draw-bridge, but such was the trifling amount of the commerce carried on through and above the bridge, that the legislature a few years since was induced, for the greater convenience of the public, to authorize the bridge to be made permanent. Such being the case, it can scarcely be considered an unjustifiable act in the company to erect their bridge at the place selected, unless in so doing they entirely and knowingly cut off the trade of the relators, and make sacrifice of all their interests in that behalf; which is not pretended. It appears that they intend to leave a safe and convenient passage for scows, which is the only kind of boat that navigates that part of the stream; and if they should not, the parties injured will have a complete and summary remedy.

Another question has been made, which is proper to be considered. The act says, that when the route or routes and location of such road or roads shall have been determined upon, and a survey of such routes and location deposited in the office of the

secretary of state, then it shall be lawful for the company to enter upon and take possession of lands, &c. And it is insisted that no such survey has been filed, pursuant to the act; that the filing of the survey is a condition precedent, without which the proceedings of the company are void. On the other side it is insisted that a proper survey has been regularly filed in the office.

Two small books have been produced before the court. They contain, it is alleged, the courses and distances of the proposed railroad, from Camden to Amboy. They give the commencement of the road; the different stations made at the time of the survey; the course and distance between each station, and the number of stations to the termination of the road. This is supposed by some to be a survey, and by others to be none. If a survey necessarily, *ex vi termini*, means a map or profile of the route, then this is no survey in that sense of the term. But I am not satisfied that this is the case. They are sometimes used as convertible terms, but not always. In the act of 1719, for settling the boundary between East and West Jersey, a plain distinction is made between *books of surveys*, and *maps* or *draughts* of land. And generally, when the term *survey* is used in relation to the location of proprietary rights, it is understood to mean a description, in words or figures, of the lands located. Such are all the surveys, as recorded in the surveyor general's office, and the meaning of the term is there perfectly understood. By our road act, the surveyors laying out a public highway, are to make a return of the road, with a map or draught of the same, with the courses and distances. The term survey is not mentioned.

Upon the whole, I take the description returned and filed in the office, to be a survey within the meaning of the act; at all events so far forth as to warrant the court in refusing an injunction against the company, on the ground that no survey whatever has been filed. If a mistake has been made by the company, acting without fraud or corrupt intention, but seeking to comply with the requisitions of the law, it does not present a proper case for the interference of this court, by the extraordinary remedy of injunction.

The injunction is refused, with costs.

CITED *in Att'y Gen.* v. *Pat. & H. R. R. R. Co.*, 1 *Stock.* 559; *Allen* v. *Freeholders of Monmouth*, 2 *Beas.* 73; *Owen* v. *Whitaker*, 5 *C. E. Gr.* 125; *Penn. R. R. Co.* v. *N. Y. & L. B. R. R. Co.*, 8 *C. E. Gr.* 160.

# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

# STATE OF NEW-JERSEY,

OCTOBER TERM, 1831.

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## MARTHA MILLER v. JONATHAN W. MILLER.

Application to discharge a *ne exeat*, not having been made until after the cause was noticed for final hearing, refused.

All such parts of depositions, as go to prove matters in no way put in issue by the pleadings, ordered to be stricken out.

The statute (*Rev. L.* 667, *s.* 2) directing that answers to bills of divorce "shall not be under oath;" the answer, though sworn to, cannot be considered as evidence for any purpose.

This court, under the statute, (*Rev. L.* 668, *s.* 10,) has original jurisdiction to allow alimony, although there is no decree for a divorce.

Articles of separation, signed by the parties, are no bar to the claim of the wife upon the husband for alimony.

The effects of the marriage are, that the husband and wife are one person: he hath power over her person as well as estate, and he is bound to maintain her in a suitable manner, according to his circumstances: the wife, by marriage, has parted with her property, and placed herself under the control of her husband, and looks to him for support.

Although the wife voluntarily left her husband's house, but afterwards offered to return; yet he has separated himself from her, and refuses to provide for her: the court ought to order a suitable maintenance to be provided for her by her husband.

The usual course is, to refer it to a master, to ascertain and report what ought to be paid for the wife's support. But testimony having been taken, and the matter debated on the hearing, and neither party requesting a reference, the allowance was fixed by the court.

Decreed, that the husband allow the wife one hundred dollars per annum, in half-yearly payments, until the farther order of the court; that he give security for the payment thereof, and pay the costs of the suit; and that either party have liberty to apply to the court for an alteration of the alimony.

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The complainant sets forth in her bill, that she was lawfully married to the defendant, Jonathan W. Miller, in the year eighteen hundred and eleven, and shortly after went and lived with him as his lawful and acknowledged wife, and so continued for a period of seventeen years; having by her said husband five children, three sons and two daughters: and the object of the complainant's bill is, to set aside the articles of separation therein set forth, alleged to be obtained by threats and promises, and without consideration; and for alimony.

William Tuttle, the trustee and one of the defendants, put in his answer, denying that the said complainant, when she executed the said articles, was under the influence of fear or of promises; but says that she did the same understandingly.

Jonathan W. Miller, the complainant's husband, also put in his answer to her said bill; and among other things, admits the marriage; but charges her with adultery, and that upon the discovery thereof she confessed it, and agreed to separate and live apart from her said husband; that an article of separation was prepared and executed, which is set forth in the said answer; and having discovered that the same was inartificially drawn, he procured another deed of separation to be drawn, which is the article set forth in the complainant's said bill, which article she read, and it was also read to her, before its execution; and he denies that he made use of any threats or promises to induce her to sign it, but says that she signed it freely and voluntarily.

To these answers replications were filed, and the parties made exhibits, and examined numerous witnesses.

Shortly before the hearing, an application was made, in pursuance of notice, to discharge the writ of *ne exeat* issued in the cause, and also to strike out and suppress the testimony of certain witnesses examined on the part of the complainant, which were named in the said notice.

The chancellor having been of counsel with one of the par-

ties, E. Vanarsdale, esquire, one of the masters of the court, was called to sit and hear the cause: which, by consent of the parties, was argued and debated before the master, at Newark, in March last, by

*Th. Frelinghuysen*, for the complainants;

*J. W. Scott* and *T. A. Hartwell*, for the defendants.

At the present term, the following opinion was delivered:—

VANARSDALE, M. The defendant, Jonathan W. Miller, having delayed his application until after the cause was noticed for final hearing, the motion to discharge the *ne exeat* was denied. With respect to the application to strike out testimony, the same was held under advisement, and the parties proceeded with the argument of the cause. And having considered of the said application, I am of opinion, that all such parts of the depositions of the said witnesses as prove, or tend to prove, immoral acts or conduct, or reports or hearsay of immoral acts or conduct, by the said Jonathan W. Miller, with one Susan Bullman, a person named and referred to in the said depositions, ought to be struck out by the clerk of the court; such immoral conduct or act, report or hearsay, being noways put in issue by the pleading in the cause: but the residue of the said application to strike out is denied.

It may be proper to observe, that the answer of Jonathan W. Miller is put in under oath. In the case of *Tomkins* v. *Tomkins*, in this court, the defendant's answer was sworn to. Chancellor Williamson says, I am of opinion that I cannot consider her affidavit to the answer as evidence for any purpose.

The legislature have directed, that in all cases of divorce, the answer shall not be under oath. (*Rev. L.* 667, *s.* 2.) In the same act, jurisdiction of causes for alimony is given to the court, and the same practice and procedure is directed. I shall, therefore, consider Mr. Miller's answer as if it had not been sworn to.

According to the course of proceeding in England, it would be necessary to set aside the articles of separation, and incidentally to give the alimony prayed for. In the case of *Ball* v. *Mont-*

*gomery*, 2 *Ves. jr.* 195, the lord chancellor says, "I take it to be the established law, that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife separate maintenance." But in this state, I consider this court has original jurisdiction. By statute, (*Rev. L.* 663, *s.* 10,) it is enacted, "that in case a husband, without any justifiable cause, shall abandon his wife, or separate himself from her, and refuse or neglect to maintain and provide for her, it shall and may be lawful for the court of chancery to decree and order such suitable support and maintenance to be paid and provided by the said husband, for the wife and her children, or any of them by that marriage, or out of his property, and for such time as the nature of the case and circumstances of the parties render suitable and proper, in the opinion of the court, and to compel the defendant to give reasonable security for such maintenance and allowance."

In the case of *Melony* v. *Melony*, in this court, decided by chancellor Williamson, upon a bill filed by the wife against the husband for divorce and alimony, the court declared there was no case stated in the bill or proved in evidence, which could warrant a decree for a divorce, but proceeded to make a decree for alimony. I have therefore no doubt that this court has jurisdiction to allow alimony, although no decree is made nor opinion given respecting the said articles of separation.

I have considered of the testimony in this cause, concerning the manner in which these articles of separation are alleged to have been obtained. The acts of ill usage proved prior to the execution thereof, are so distant therefrom, and were attended with such circumstances, that I see no reasonable ground to believe that they had any influence in procuring said articles; and as to the time the same were executed, there is no sufficient proof that they were obtained by the threat or promises charged in the bill.

Jonathan W. Miller, in his answer, says, that the complainant, upon being charged with adultery, confessed it; and thereupon they agreed to live separate. And I have no doubt that such confession was the cause of their agreement to live apart, and of procuring the said articles to be executed. Mr. Miller ought not to be blamed for wishing to live apart from his wife,

after she had made such confessions; but he ought to have applied to a proper tribunal for that purpose, or provided her with suitable support. Nor could it be expected that he would be satisfied with the excuse that she denied it shortly after, nor that she said she would die sooner than confess it again.

It may be that if the husband seek for a divorce against his wife on the charge of adultery, he must prove it; but the case is different when she seeks to be relieved against articles founded upon her confession of the charge. Without, therefore, entering into the question of the consideration, the master is of opinion, that this court ought not to set aside the said articles. Whether they will bar the complainant from the recovery of alimony, which is founded on the marriage contract, remains to be considered.

Two objections are made to it:—1. That she has committed adultery. 2. That she is barred by the articles of separation.

As to the charge of adultery, it could answer no useful purpose to state and compare the evidence on both sides. I have considered of it, and the arguments of the counsel The evidence in support of the charge is contradicted by evidence on the part of the complainant; and each party has attempted to discredit the testimony on the other side. My opinion is, after considering the circumstances of this case, that the charge is not sufficiently proved to bar the complainant's claims for alimony.

With respect to the articles of separation, it is therein agreed, among other things, to live separate, and that the said Jonathan was not to claim any thing he might give her within ten days, nor such property as she might afterwards acquire; and was to pay to the said Martha yearly, on the first day of May, during her natural life, the sum of one dollar, which sum she accepted in full satisfaction for her support and maintenance, and of all alimony during coverture, and dower in case the said Martha survived the said Jonathan.

By these articles no provision is made for the support of the complainant, the annual payment being a mere nominal sum. It does not appear from the testimony that she had a separate property for her maintenance, nor that the clothing taken by her and property given to her within the ten days mentioned in the

articles, would answer for that purpose. How, then, is the complainant to be supported? Her friends may do it if they please, but they are under no legal obligation to provide for her: nor are the public bound to support her as long as her husband is of ability to do it.

By marriage with a woman, the husband is entitled to an absolute or qualified right to all her estate, real and personal; and the effects of the marriage are, that the husband and the wife are accounted one person, and he hath power over her person as well as estate, and he is bound to support and maintain her in a suitable manner, according to his circumstances. The wife, by marriage, has parted with her property, placed herself under the control of her husband, and looks to him for support.

In the before mentioned case of *Melony* v. *Melony*, the chancellor says, "I am clearly of opinion that the agreement between the parties to live in a state of separation, cannot be recognized in this court as valid, and that such agreement is a direct contravention of the marriage contract. It is contrary to sound policy as well as morality, that the parties who have entered into the marriage state should be permitted to separate, and agree that they will live in a state of separation, and free from the obligations imposed on them by the marriage. The marriage contract cannot be annulled and cancelled, nor the parties absolved from their obligations of it by their private agreement." And he further observes, that the complainant, in his opinion, "had a right to put an end to that agreement whenever she pleased, and to call on her husband for the fulfilment of his marital obligations. What remedy the husband might have upon the agreement, against the trustee, is not now a question for consideration. And I think it sufficiently proved, that the complainant has offered to return and live with the defendant, and that he refuses to live with her, and neglects to provide for her or to maintain her according to his circumstances and situation in life."

In the before mentioned case of *Tomkins* v. *Tomkins*, the chancellor remarks, "A husband has no right, upon a charge of adultery against his wife, to turn her out of doors, or by his cruelty to drive her from his house destitute and unprovided for." And again: "It may have been the misfortune of a husband to

have connected himself in marriage with a profligate and abandoned woman; but his obligation to maintain her continues until the marriage bonds are legally dissolved, or she voluntarily separates herself from him: 6 *Mad.* 171, *S. C.;* 1 *Salk.* 119; 1 *Esp.* 441."

In *Nurse* v. *Craig,* 5 *Bos. and P.* 148, the husband and wife lived separate, and he covenanted by deed with his wife's sister to pay a certain weekly allowance during their separation; and the wife afterwards lived with her sister, and was by her supplied with necessaries. The husband failed to pay the stipulated allowance. The wife's sister maintained indebitatus assumpsit against the husband for necessaries. It was objected, she ought to have sued on the covenant; but the majority of the court held, that as the husband had failed to pay according to the agreement, he was liable for the necessaries furnished for his wife.

It seems only necessary to add, that it is the opinion of the master, that the articles of separation mentioned in the pleadings are no bar to her claims on her husband for alimony.

In the present case, although it appears that the complainant voluntarily left her husband's house, it also appears, that afterwards she offered to return; that he has separated himself from his said wife and refuses and neglects to provide for her; and it is my opinion that the court ought to decree and order her suitable support and maintenance, to be provided for her by her said husband.

What is such suitable support and maintenance, remains to be determined. The usual course in such cases is, to refer the matter to a master, to ascertain and report what allowance ought to be paid for the complainant's support. But testimony having been taken, and the matter debated on the hearing, and neither party requesting a reference so as to take further evidence, I have considered also of this matter. It appears that the complainant has a weakly constitution, and is not able by labor to support herself: that the defendant, Jonathan W. Miller, provides for his five children; and that his estate is worth about seven thousand dollars. The income of the farm is not proved, and it cannot with certainty be ascertained from the price it will bring.

From the consideration of this case, under all its circumstances, I am of opinion it ought to be decreed that the said Jonathan W. Miller, for the time to come, do provide for the support of the complainant, one hundred dollars per annum, to be paid to her, or some person to be named by the court for her, in half-yearly payments, until this court shall make other order to the contrary: that he pay the costs of this suit: that either party have liberty to apply to the court for an alteration of the alimony or maintenance, as occasion may require: that the defendant give reasonable security for such alimony or maintenance; and that in the mean time, and until the order of this court to the contrary, the writ of ne exeat be continued. And in case he shall refuse or neglect to give such security, that the complainant have the remedy provided by the ninth section of "an act concerning divorces, and for other purposes," *Rev. L.* 668.

ELIAS VANARSDALE,
Master in Chancery.

CITED *in Yule* v. *Yule*, 2 *Stock.* 145; *Rockwell* v. *Morgan*, 2 *Beas.* 120; *Anshutz* v. *Anshutz*, 1 *C. E. Gr.* 165.

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## THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, v. WARREN HAIGHT.

Parol evidence is inadmissible to disannul or substantially vary a written agreement, except on the ground of mistake or fraud.

Where there is a clear subsequent and independent agreement, evidence of it may be received; but not where it is a matter passing at the same time with the written agreement.

There are instances where a general understanding and practice may be set up to *explain* a written agreement, but it must amount to a custom, and be pleaded as a custom from time immemorial; such as the custom in favor of the tenant's taking the way-going crop; but even such custom cannot be insisted on if it be excluded by the terms of the agreement.

Under a lease from the Society for establishing useful Manufactures, of a lot of land extending from their canal on Boudinot street back to the river Passaic, with the privilege of a certain quantity of water to be used on the lot for milling purposes, without any limitation as to the head and fall; the

tenant may avail himself of all the head and fall that can be had within the specified limits of his lot.

Parol evidence of a general understanding among the tenants, or of previous circumstances going to show that the lots on this tier were entitled to less head and fall, is inadmissible; and an injunction to restrain the tenant from sinking his wheel-pit and race to a level with the surface of the water in the Passaic, so as to obtain all the head and fall between the canal and the river, was refused.

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The facts stated in the complainants' bill are briefly these. In 1792, after the incorporation of the Society for establishing useful Manufactures, they purchased of one Cornelius Van Winkle a tract of land, on which were a saw-mill, grist-mill and dam, situate on the main stream of the Passaic river at Paterson, together with the bed of the river and an island in the river adjacent to the mill. The whole tract lies below the falls, and below the aqueduct made by the Society to supply the mills and factories in the town with water. The mill was an ancient mill, and had been in operation at that time upwards of twenty-five years. In November, 1810, the mill and dam were swept away by a great freshet, and have not since been rebuilt, but they intend shortly to restore the dam.

Before the dam was swept away, the society brought the water by a canal from the Passaic above the falls, along what is now called Boudinot street, and there laid off certain building lots, or mill seats, which they offered to lease with certain privileges, and with a right to have a head and fall of water equal to twenty-two feet, which was all that could be granted or enjoyed while the Van Winkle dam was standing. They arranged the head and fall in such manner, as that there should be no interference between their use and right of the water-privileges at the Van Winkle mill and the mills along the canal.

According to this arrangement they proceeded to make leases of the said mill seats on Boudinot street. In 1807 they granted a lease to John Clark, and one to John Parke, who erected their mills and water-wheels with reference to the Van Winkle dam below, and with a full knowledge that only twenty-two feet head and fall of water, were appropriated to the line of mill-seats on Boudinot street. In 1808, they caused a map to be made of

the lots and premises, which has been in use ever since as the public map of the society; on which it is expressly stated that each of said lots could have a fall of water of twenty-two feet.

It is then further charged, that all the subsequent lessees have known and understood that only a head and fall of twenty-two feet was granted by the society; and such was the understanding of one Henry Godwin, who on the 1st February, 1816, took a lease for the mill-seat now occupied by Warren Haight, the defendant. That this mill-seat was first leased to one Henry Berry, in October, 1811. Berry assigned his right to Godwin, and Godwin gave up the assigned lease and took out a new lease to himself. That there has never been any controversy between the society and any of the lessees about the head and fall, until June, 1827, when the defendant undertook to sink a new wheel-pit at the outlet of the tail-race of his mill, to a level with the surface of the water in the Passaic river, in its natural current; and that if not restrained he will thereby obtain a head and fall of twenty-six feet and more, and thereby deprive the society entirely of their water rights and privileges, growing out of the purchase of the Van Winkle mill and dam. That as soon as they were informed of the aggression, they served a written notice upon the defendant, stating that he was encroaching upon their privileges; that he was restricted to twenty-two feet head and fall; and that they intended shortly to rebuild the Van Winkle dam; and protesting against his intended encroachments. That notwithstanding this notice, the defendant presists in his unlawful undertaking. The bill prays that he may be restrained from further proceedings, and also from continuing the improvements already made.

A demurrer to the bill was overruled, after argument, in July, 1828.

The defendant in his answer, denies any knowledge of the purchase from Van Winkle; but says he has been informed, and therefore admits, that the mills and dam said to have been purchased as aforesaid, were swept away by a freshet in 1810, and that the complainants have not rebuilt them. He does not admit that they intend to rebuild them; and denies that he ever heard of such intention until after he had made the improvements com-

plained of. He does not admit that the lessees of mill-seats under the society, were restricted to twenty-two feet head and fall, or any other head and fall, except such as was limited by the situation of the canal and river; nor does he believe there was any such understanding; nor was there any number of feet guaranteed to the lessees by the society.

He states further, that he never heard of any map of the premises, until the society had filed their bill. He admits, that in 1816 the complainants leased to Henry Godwin a mill-seat on Boudinot street, which is now in possession of the defendant; he holding it by divers mesne assignments from Godwin, who is now deceased. That at the time of taking the lease there was no stipulation that he was to have a head and fall of *only twenty-two feet;* but it was expressly agreed that he should have the lot from the canal to the Passaic, with such head and fall as existed between the said canal and the river, as it was at the time. He denies that there was any understanding with any of those who took leases after the dam was carried away, that they should be limited to twenty-two feet head and fall, or that they had any notice that the society intended to rebuild the dam, or to raise the water above what was then its ordinary level; and asserts that he himself had no such notice, and believed that he was purchasing the right to use the water on the lot with all the fall between the canal and the river. He says that long before he made his improvement, other lessees had made similar improvements on their property without interruption or complaint. He admits the erection of the building and sinking the pit; and also the notice given by the complainants, after the pit was sunk and the building raised and nearly completed; and insists upon the enjoyment of his lot and privilege, according to the terms of the lease under which he holds.

Depositions were taken and proofs exhibited. The case was argued by

*T. Frelinghuysen* and *W. Pennington*, for the complainants.

*P. Dickerson*, for the defendant.

Cases cited:—*Eden Inj.* 140; 2 *John. C. R.* 162, 272, 463; 2 *Ver. R.* 39; *Prec. in Ch.* 530; 1 *Ves.* 543, 188; 3 *Atk. R.* 21; 2 *Atk. R.* 83; 2 *Dow*, 519; *Coop. Eq. R.* 77; 16 *Ves. jr.* 257; *Angell W. C.* 50, 51, 75, 149; 2 *Stark. Ev.* 386; 1 *Saund.* 346; 2 *East. R.* 358; 1 *Ves. jr.* 241; 1 *John. C. R.* 349; 1 *Bro. C. R.* 92; 2 *Ves.* 375.

THE CHANCELLOR. The complainants have offered in evidence, the old lease from the society to Henry Berry, and which was assigned by him to Henry Godwin. It bears date in 1811, and is for twenty-one years, reserving a rent of seventy-five dollars. It bounds on the river, and there is no limitation or covenant as to the head and fall of water between the canal and the river.

They have also offered in evidence a counterpart of the lease from the society to Henry Godwin, in 1816. It is for seventeen years, reserving a rent of ninety dollars. This lease also bounds on the river, and is also without restriction or limitation as to the head and fall of water.

If this case is to rest upon the lease between the parties, independently of any evidence that may go to explain, modify, or contradict that instrument; and independently of any agreement or understanding, which, although out of the lease, may be supposed binding in equity, there can, I think, be no doubt as to what ought to be done. The lease is absolute on the face of it. It grants, for a limited time, the use of the whole property, for a valuable consideration. There is neither doubt nor difficulty about it, and the bill must be dismissed as entirely groundless. But if evidence is to be admitted to show a state of things which existed prior to the lease, or to show the understanding of the parties as to certain rights directly affected by the lease, or the understanding of third persons in relation to property similarly situated, it may lead to a different result.

I propose, then, to examine distinctly the evidence offered by the complainants in support of their bill, independently of the leases, and see how far it is admissible evidence; and if admitted either in whole or in part, ascertain the effect of it on the rights of the parties.

There are three prominent matters relied on by the complainants:—1. There was a map, which they call a public map, of the premises, embracing all the mill lots on Boudinot street, of which the defendant's is one. On the face of this paper, there is a written description of the property embraced in it, to which description is added these words: "Each lot marked on this map can have a fall of water of twenty-two feet." This map is proved to have been made for the society about the year 1808, by Abraham Willis, who was a surveyor. It was kept by Mr. Abraham Vanhouten, the society's agent; and one of the witnesses says he saw it whenever he pleased, and that this was supposed to regulate the whole. The same witness says that he thinks he has seen the map three or four times; he remembers seeing it twice in one week. He saw it at Mr. Vanhouten's house, and on the lot, and at the house of the surveyor while he was making it; since which he has not seen it until lately. Several saw it about the time the survey was made. Another witness testifies to the making of the map by Willis. He saw it directly after it was made, and has seen it frequently since, until within some years last past. He has not seen it lately, having had no occasion to see it. After the map was made he always referred to it as his guide.

It is contended that this map is evidence in relation to the contracts, or to the rights of the parties under the contracts; and that, according to the map, the lessees are entitled to twenty-two feet head and fall, and no more. Taking this to be the case, is it evidence to contradict the lease? If such is to be the effect of it, I am at a loss to perceive how it can be admitted. The general rule is against the admission. It is clear and explicit, and has been adopted upon great deliberation. The difficulty generally is, not as to the rule, but the exceptions to it; for like all other general rules it has its exceptions. In cases of *fraud*, *mistake*, *surprise*, or *accident*, clearly proved, parol evidence has been admitted. They raise an equity on a ground collateral to the deed, and "may be holden to vary it accordingly:" *Rich* v. *Jackson*, 4 *Bro. C. C.* 419, *in notis*. But here there is no such ground laid. The complainants do not invoke aid on either of these heads of equity; nor do they seek it because of any *omis-*

*sion* in preparing the lease. But they attempt to bring in this map, and the facts that have been testified to in relation to it, as evidence of an agreement or understanding, as to the precise head and fall of water that the lessees were to enjoy, and that agreement or understanding made or had at the time the original agreement or lease was entered into; for if not then, when was it? In this attempt they are opposed by well settled principles. Where there is a clear, subsequent and independent agreement, varying the original one, evidence of it may be received; but not where it is of a matter passing at the same time with the written agreement. In *Movan* v. *Hayes*, 1 *John. C. R.* 343, the chancellor says, the rule is established in this court, as well as at law, that parol evidence is inadmissible to disannul, or substantially vary a written agreement, except on the ground of mistake or fraud; and the cases of *Irnham* v. *Child*, 1 *Bro. C. C.* 92, and *Hare* v. *Shearwood*, 1 *Ves. jr.* 241, are cited. It is important, too, to notice the fact, that this agreement or understanding, so far as it is to be inferred from the existence of the map, is expressly denied in the answer, in which the defendant swears that he never heard of any such map until after the filing of the bill. Such denial shows more clearly the propriety of excluding the evidence, and adds strength to the rule.

2. A second matter relied on, is the alleged general understanding of the lessees on that tier of mill-seats, that their right was limited to twenty-two feet head and fall.

On this subject one of the witnesses, Clark, who leased in 1806, before the carrying away of the Van Winkle dam, testifies, that he thinks it was generally understood, after witness took his lease, that the lots to be leased on that tier had a head and fall of twenty-two feet. He was frequently asked, about this time, what was the head and fall, and he always informed inquirers that it was twenty-two feet. When he made his agreement with Mr. Boudinot, he was to have twenty-two feet head and fall, and it was so expressed in the agreement, which he gave up to the society fourteen or fifteen years ago. This agreement was before the map, and that fact witness states as the reason why it was expressed in the agreement. Charles Kinsey, another witness, states, that he lived in Paterson when the mill lots were laid out,

and always understood from common report that they had twenty-two feet head and fall. He has been inquired of by captain Ward and others on the subject, and always told them what was the common understanding. John Parke says, he has always considered that the lots on Boudinot street had twenty-two feet head and fall, and always told others so. He thought himself entitled to no more, and that if he had not so much he would be entitled to a remuneration.

Admitting now, for the sake of the argument, that this evidence proves a general understanding that the lessees on that tier of lots were entitled to no more than twenty-two feet of water, (which I think it does not,) can such general understanding alter the tenor of a solemn instrument? Is it not altogether too vague and unsatisfactory? There are some instances, it is true, where a general understanding and practice may be set up to *explain* a written agreement; but it must amount to a custom, and be pleaded as a custom from time immemorial. Such was the case of *Wigglesworth* v. *Dallison*, *Doug.* 201; where the custom of the country in favor of taking *the way-going crop* by a tenant, was set up and maintained. But even such custom cannot be insisted on if it be excluded by the terms of the agreement.

This evidence appears to me to come precisely within the rule applied to the evidence respecting the map. It proves, if any thing, an agreement between the parties, or something in the nature of an agreement, made at the time of the lease; and, affecting the rights of parties under the lease, it is clearly inadmissible.

3. A third matter relied on by the complainants is, that Henry Godwin, under whom the defendant holds by assignment, knew of this general understanding, and was bound by it; and that, consequently, his assignee is also bound.

The only evidence on this subject is that of Clark, who says he heard Godwin say he had twenty-two feet head and fall; and he asked deponent if he had taken the height, and deponent said he had, that it was twenty-two feet. This was while Godwin occupied the lot, not when he made the agreement and took the lease; and being after the lease was made, if it proved "a clear

and independent agreement, varying the lease," it might be admissible. But it proves no such thing. The deduction to be drawn from it, is, that Godwin had satisfied himself that he had twenty-two feet, head and fall; not that he had no more, or was entitled to no more, or that there was an agreement of any kind whatever.

My conclusion is, that no part of this testimony can be received, to vary, or alter, or contradict, the plain tenor of a written agreement or lease.

It was contended, however, by one of the counsel of the complainants, that the evidence does not contradict the lease, or vary its terms, inasmuch as the lease is silent as to how much head and fall the party is entitled to. The lease grants to the lessee the one half of all that lot of land, beginning, &c., bounded on the south by the canal in Boudinot street, west by a lot occupied by Alvin Wilson, north by the Passaic river, and on the east by Crane's lot; together with the privilege of taking water from the canal in Boudinot street equal to seventy-two square inches, for the use of a fulling-mill, &c.: to have and to hold, &c. By virtue of this grant, the lessee takes the lot from the canal to the river without any restriction whatever. If the lessors were to set up an agreement or understanding that the lessee was not to use the lot within twenty feet of the river, would it not be contrary to the tenor of the lease? Would it not impose a restriction by parol, where none existed by the covenant? So with regard to the water. The lessee is to have seventy-two square inches of water from the canal. If there were no restrictions in the lease, he might use the water for any lawful purpose; but by the lease it is to be used for milling purposes only. This was a restriction the company had a right to impose, and the lessee was at liberty to agree to it if he thought proper; and having done so, he is bound by it. The use of the water is restricted in no other way by the terms of the lease. But if an agreement is set up, restricting the lessee to twenty-two feet head and fall of water, when by the lease he is entitled to twenty-six feet, are not the terms of the lease altered, and the party's rights impaired? Will he enjoy what by the terms of the lease he is at liberty to enjoy? The matter is too plain for controversy. Where there is a deed in

writing, says Ld. Eldon, it will admit of no contract that is not part of the deed. Whether it adds to or deducts from the contract, it is impossible to introduce it on parol evidence: *Irnham* v. *Child and al.*, 1 *Ves. jr.* 93.

Upon the whole, I entertain no doubt that evidence, such as the complainants seek to offer, would vary the terms of the agreement, and is therefore inadmissible.

I would observe, further, that if I should be mistaken in my conclusions on the questions of evidence, and if the whole of the testimony offered by the complainants was competent, it would not, in my opinion, vary the result. The bill charges that the knowledge and understanding of all the lessees was universal, that *only* a head and fall of twenty-two feet was granted. This should be fully and clearly proved. To vary the written agreement, the parol proof should be, if not so formal, at least as satisfactory to the mind of the court, as the evidence furnished by the deed. I do not think the allegation is satisfactorily sustained by the evidence. The map certainly does not prove it. In describing the property, it is said, "each lot *can have* a head and fall of twenty-two feet." Does this necessarily mean, it shall have that precise quantity, and no more? Does it mean anything more, than that each lot, from its relative position to the canal at one end, and the river at the other, is capable of having on it a head and fall of twenty-two feet at least? Without deciding on the import of the description, it is sufficient to say, that if there be doubt, reasonable doubt, it is conclusive against the evidence; it can have no effect as against the lease.

And so with regard to the general understanding, as proved by the witnesses; when the testimony is examined, it turns out to be simply this: that it was *generally* understood that the lots leased on that tier had a head and fall of twenty-two feet. Mr. Kinsey mentions this common report in his evidence, and says it originated from the fact that the engineers, in taking the level, reported that there would be a head and fall of that amount between the canal and the river. This is mere description; and though the knowledge of it may be brought home to Godwin, it cannot amount to an agreement that will vary his rights under the lease. One of the old witnesses says, he considered himself

entitled to only twenty-two feet; but he does not say that this was a common understanding, and especially among those who took leases after the dam was swept away.

It would be a source of regret to the court, if the decision in this case should result in any serious injury to the complainants; but feeling cannot be suffered to have any operation in the administration of the law. The complainants will remember, that it grows out of their own act. They had an unquestionable right to the mill-seat below; but the mill and dam being carried away, they had the same right to abandon it if they thought proper so to do. That such an abandonment has actually been made, is not necessary for me to decide; but the fact, that a grant has been made by the society, of rights and privileges inconsistent with those here assumed by themselves, is sufficient evidence of such abandonment, in favor of the grantee, to protect him from the interference of this court, by injunction.

Let the bill be dismissed, with costs.

CITED *in Stewart* v. *Scudder*, 4 *Zab.* 105.

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JOSEPH CONOVER AND JOHN S. REID, SURVIVING EXECUTORS OF WILLIAM P. CONOVER, DEC'D, v. RICHARD CONOVER ET AL., AND JOSEPH CONOVER AND JOHN S. REID, SURVIVING EXECUTORS OF THEODORUS CONOVER, DEC'D, v. RICHARD CONOVER ET AL.

Where a party has occupied premises belonging to another, it follows, as a matter of course, that he is bound to pay for the use and occupation; unless he can show an agreement to the contrary, or a satisfactory reason why he should not be charged.

Where a plaintiff sues both at law and in equity for the same thing, he will, after answer filed, be put to his election in which court he will proceed; and if he elect to proceed at law, or neglect to make his election in proper time, his bill will be dismissed.

Where no steps have been taken in the suit at law, but testimony has been taken on both sides in this court relative to the same claim, and the suit has pro-

ceeded in this court without objection; the complainant will be considered as having made his election, and any farther proceedings at law will be stayed by injunction.

A claim for rent due the testator, not having been mentioned in the inventory, or the executors having settled their account in the orphan's court, and on the credit side prayed allowance for it, as not being collected; cannot conclude them as against the debtor: they may still recover, and in case of recovery, they are liable, notwithstanding the account, to those beneficially interested.

The rule in courts of equity now is, that they will take notice of the statute of limitations, and apply it in the same manner as courts of law.

To take a case out of the statute, when there is no express promise to pay, but one is to be raised by implication of law, the acknowledgment of the party ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of an intention or willingness to pay, or if the expressions be vague and equivocal, leading to no certain conclusion, the evidence ought not to be admitted.

When executors have settled their account in the orphan's court, if there be no evidence of fraud or mistake, this court will not disturb the settlement; but take the balance stated in the account to be the true balance in the hands of the executors.

The testator devised a farm charged with a sum of money for the benefit of his estate, and made the devisee one of his residuary legatees; there was also a demand for rent due from the devisee to the testator. The devisee had sold part of the land devised, and a judgment at law had been obtained against him. Upon a bill filed by the executors against the devisee and judgment creditor, to raise the sum charged on the land and the amount due for rent; the residuary share due the devisee is first to be deducted from the amount charged on the land, and the land held chargeable with the balance; that part of the land remaining unsold to be first liable, and the other part resorted to only to supply a deficiency; the judgment to be next satisfied, and then the demand for rent.

Where two bills were filed by the executors of two several testators, who were tenants in common of all their property, and devised it to the same persons; where the parties interested, and their rights, were the same under both wills; the two suits, on their hearing, may be consolidated, so that one investigation and report of the master, and one decree, may settle the whole.

Where the statute of limitations is insisted on by the answer, and there is no evidence of a promise, to take the case out of the statute, the master directed, in taking an account of rent due for use and occupation, to exclude all items over six years standing at the time of the commencement of the suit.

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William P. Conover and Theodorus Conover, of the county of Monmouth, were brothers, living together, and owning and

possessing all their property, real and personal, as tenants in common. William married and had children; Theodorus was never married. On the sixteenth day of October, 1815, each of them made a last will and testament. William gave his half of the property to his four children, in certain portions; and Theodorus gave his half to the same persons. The instruments were as nearly alike as they could be drawn, and were so intended to be. By these wills each testator devised to Richard Conover, one of the defendants, his moiety of the farm or plantation they had purchased of Barnes H. Smock; each charging the moiety devised with the sum of twelve hundred and fifty dollars, for the benefit of his estate, payable within two years after the decease of the survivor. Richard and the other children of William are residuary legatees under both wills. William P. Conover died in 1823, and Theodorus in 1825. In 1829 bills were filed by the executors in each case against Richard Conover and wife, to recover the amount so charged on the land; and James R. Conover, being a purchaser under Richard, and Job Throckmorton, being a judgment creditor, were made parties.

In the answer to these bills, Richard admits the charge upon the property devised to him, but insists, that as it appears by the settlement of the estate in the orphans' court, there is a large sum, viz. one thousand eight hundred and eighty-nine dollars and eighty cents due him as one of the residuary legatees under the will, which sum is now in the hands of the executors; he is entitled to have that sum deducted from the charge against him in the wills; and proffers himself ready to pay the balance, whatever it may be found to be on a fair account.

To this answer exceptions were taken on various grounds, but principally on the ground that the defendant claimed to have his distributive share deducted from the amount charged against his land; the complainants alleging that they had accounts or demands against him for rent, which should be set off against his distributive share; and that the defendant's claim could only be brought up by filing a cross-bill. The exceptions were overruled, and thereupon the complainants amended their bills, by inserting a claim for rent for a number of years prior to the death of the

testators, during which time Richard occupied the farm which was afterwards devised to him. To these amended bills the defendant has answered. He admits the possession, but denies that he was to pay any rent; and sets up the statute of limitation as a bar against any such claim. He also insists, that if rent is to be charged against him, he is entitled to compensation for services. Testimony has been taken on both sides. The cases were argued together, by

*Randolph* and *Southard*, for complainants;

*Ryall* and *Wall*, for the defendants.

Cases cited:—1 *Fonb. E.* 461; 3 *John. R.* 566; 8 *Com. D.* 108; 1 *Mad. C.* 79, 202; *Rev. L.* 787; *Mitf. P.* 200–1–4; 3 *P. Wms. R.* 90; 2 *Cox's C. R.* 118; 4 *Cranch's R.* 415; 6 *Ves. jr.* 586; 9 *Ves. jr.* 71; 10 *Ves. jr.* 93; *Coop. E.* 252; 3 *Atk. R.* 7; 2 *Ld. Raym.* 1204; 20 *John. R.* 576; 11 *Ves. jr.* 24.

THE CHANCELLOR. There is no doubt as to the charge on the lands. It is admitted on all hands, that the two thousand five hundred dollars is due, and must be satisfied.

The principal matter in dispute is the charge for rent.—When Richard first occupied the farm which was afterwards devised to him, he occupied it in connection with his brother William, now deceased, and there is some evidence to show that they made some render, in kind, for the use of the property. After the death of William, which was in 1814, Richard enjoyed the property alone, without rendering rent to either of the testators; and the question is, whether he is to be charged. He alleges that it was a mere gratuity and benevolence on the part of his father and uncle; that he made no contract or agreement of any kind to pay rent, and that none was ever demanded in their life-time: that Joseph, the executor, occupied a part of the testator's property without paying rent, and also Samuel another part. On the other hand it is contended that the property occupied by Richard was much more valuable than that occupied by Joseph

or by Samuel; that the rent demanded (fifty pounds per annum) is far short of the actual value of the premises, and just enough to equalize among the brothers the favors of the testators in their life-time. That Richard is charged with the rent in the account book of William P. Conover; and that whether any contract be proved or not, he is bound on general principles to pay for the occupancy, unless he can show satisfactorily that he should be absolved from the payment.

On examining the evidence, I do not find any to warrant the conclusion, that there was an agreement, in express terms, to pay rent, or any acknowledgment on the part of Richard which can be considered as binding him to pay. Most of it rests upon hearsay or presumption, except that of Mrs. Alice Conover, which is altogether inadmissible on the ground of direct interest in her husband, who is one of the complainants and residuary legatees. An account book has been produced by the complainants, which is proved to have been the book of William P. Conover, one of the testators. In this book there is a charge, or memorandum purporting to be a charge against Richard, for rent, at one hundred and twenty-five dollars per year, commencing in 1815. It is continued in the hand-writing of William P. Conover, year after year, up to April, 1822. In 1823 William died, and the charge for the rent due in April, 1823, is made in the hand-writing of Joseph Conover, the executor. He is charged also, in the same book, by Joseph Conover, with a moiety of the rent for 1824 and 1825, up to the death of Theodorus Conover, which took place in 1825. I have not much confidence in this book. It is a very ancient one, and liable to many exceptions; and if this were a claim, the existence or validity of which was to depend altogether upon the book, I should incline to dismiss it at once. But it appears to me that the claim for rent rests upon much higher ground. The occupation of the premises is proved beyond doubt: that the property at the time belonged to the testators, is equally true; and it follows as a matter of course, that the party in possession is bound to pay for the use and occupation, unless he can show an agreement to the contrary, or some satisfactory reason why he should not be charged. The burthen of the proof rests upon the defendant, who would resist the

claim: and the question is, whether such proof has been made. He offers no direct evidence, but argues that the claim is unfounded, from the fact that no rent was ever exacted of him in the lifetime of the testators. That the other brothers, who occupied other separate portions of the real estate, paid no rent whatever. And that the testators, by their wills, had given to them severally the tracts which they had long occupied, saying nothing of any demand against them or any of them. There is weight in the argument, but it does not satisfy my mind as sufficient entirely to repel the claim. It may be true that no rent was exacted of him by the testators while living, and yet be equally true that they intended him to account for it after their death. And it may in like manner be true that the other brothers were not required to pay rent, and yet be perfectly just that Richard should pay a small annual compensation; for the property he possessed is represented to have been much the most valuable; and it may be that a strict regard to justice required that the testators should charge a small amount of rent to make him equal with the other brothers, who were also sharers of their bounty. The fact that this property was charged with the payment of a considerable sum of money, viz. two thousand five hundred dollars, and that Samuel's share was charged with only one hundred and twenty-five dollars, and that nothing was charged on Joseph's share, but that on the contrary some items of personal property were given to Joseph with the land, over and above his equal part of the residuum; proves nothing in favor of the defendant. It appears to me the conclusion to be deduced from it is against him. For if the testators intended to leave them equal, and such appears to have been the intention; and if that could only be done by imposing a charge of two thousand five hundred dollars on the share of Richard, it is evident that the same principle of equality would have caused them to charge him a rent for the enjoyment of his share while they were yet living, though the others paid nothing. Equal justice was thereby awarded to all. I incline, therefore, to the opinion, that something in the way of rent is to be charged against Richard; and I think that as to the amount of it, the court should be governed by the amount charged in the book. It may not be the full value, but it certainly

is not more. And being the amount intended by the testators, the complainants can reasonably ask nothing more.

Some additional objections have been made to the claim for rent. One is, that this court can take no cognizance of it at this ime, inasmuch as there is a suit for the same subject matter pending undetermined between the same parties, in the court of common pleas of the county of Monmouth. This is set up and insisted on in the answer, in lieu of the formal plea in bar. The practice is, where the party sues both at law and in equity for the same thing, he will be put to his election in which court he will proceed, but need not make his election until after the defendant has answered. If he elect to proceed at law, or neglect to make his election in proper time, his bill is to be dismissed: *Jones* v. *Earl of Strafford*, 3 *P. Wms.* 90; *note B. Anon.*, 1 *Ves. jr.* 91; *Mitf. P.* 91; *Rodgers* v. *Vosburgh*, 4 *John. C. R.* 84; *Boyd* v. *Heingelman*, 1 *Ves. and B.* 381; *Beam. P. in E.* 150, 151. In this case there has been no order putting the party to his election, nor any application for such order so far as I am informed. The proceedings in this respect have not been altogether formal, but an election has been made in fact. No steps have been taken in the suit at law. Testimony has been taken on both sides in this court relative to the very claim for which the action was brought, and the suit has proceeded here without objection. I think it would be entirely too technical, under these circumstances, to say that the complainants should be turned out of this court and driven to pursue their remedy at law. They will be considered here as having made their election, and must abide the result. Any further proceeding at law will be stayed by injunction.

It does not appear to me to be a sound objection against this claim for rent, that there is no mention made of it in the appraisement of Theodorus's estate. It may have been omitted because charged in the inventory of William's property; and if omitted for any other cause, it constitutes no bar to a claim properly established. As the whole claim was embraced in the first inventory, it was perhaps proper to make no mention of it in the second. Nor is it any better objection, that the accounts have been settled in the orphan's court, and that in the accounts the execu-

tors are not charged with this rent. On inspecting the accounts it appears, that in making the settlement the personal property of both decedents was brought together, and the whole put in one account. The executors charge themselves with the whole amount of both inventories, and on the credit side of the account pray allowance for the rent, as not being collected. I take this to be strictly correct. It certainly cannot conclude them as against the debtor; it bars no right as against him. They may still recover, and in case of recovery they are liable, notwithstanding the account, to those who are beneficially interested in the sum recovered.

But it does not follow that, because rent is to be accounted for, that therefore the whole sum charged against the defendant for ten or fifteen years is to be allowed. The defendant has prayed, in his answer, to be admitted to the benefit of the statute of limitations, and I think with very great propriety. It is unnecessary to discuss the point, how far courts of equity are bound by the statute. The rule, as now received, is, that they will take notice of it, and apply it in the same manner as courts of law. Such has been the admitted doctrine of this court in former cases, and I see no cause to question its propriety or soundness. There is nothing in this demand that can exempt it from the operation of the statute. It is not a trust, but in the nature of a legal demand, which might have been prosecuted in the common law courts, and to which the statute of limitations might have been pleaded. It is said, however, that this case is taken out of the operation of the rule, by the admissions of the defendant in his answer, and by the evidence. The defendant, by his answer, admits the possession, but denies in the most unqualified terms the existence, either now or at any other time, of the debt charged against him. Neither in the answer or the testimony, is there any thing to show an admission of the debt on the part of the defendant. What promise or admission shall be sufficient to take a case out of the operation of the statute, has been long and much controverted in the courts. Different judges took different views of the question, and various devices were resorted to to evade the statute. One refinement was added to another, until the provisions of a wholesome law became almost a nullity. Of late years these

refinements have been approached for examination, and the glare of great names having passed away, it has been found, upon a closer inspection, that they are destitute of sound sense and practical utility to support them. The late decisions have corrected the errors that were afloat, and given the true construction of the statute, and in a way calculated to settle it. It would answer no useful purpose to go over the cases. In 1828 the question came up before the supreme court of the United States, in the case of *Bell* v. *Morrison*, from the district of Kentucky: 1 *Peters R.* 351. The opinion of the court was delivered by justice Story. After reviewing all the principal cases, he lays down the following rule:—"If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think they ought not to go to the jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the danger of being entrapped in careless conversations, and betrayed by perjuries."—This is a safe and salutary rule, applicable as well to this court as the courts of law. Where the jurisdiction of the two courts is concurrent, the rule should be the same. There is no possible reason why the rights of parties in this respect should be changed by the change of *forum*. My opinion therefore is, that all such items of charge for rent as were of more than six years' standing at the time of the commencement of the suit in the common pleas for rent, must be considered as barred by the statute.

Against the sums properly payable by the defendant, he prays an allowance of one fourth part of the residue of the personal estate. To this he is undoubtedly entitled. And in taking the accounts, the balance in the hands of the executors, as it appears by their own accounts, is to be taken as the true balance. I do

not find any thing in the evidence, or in the accounts themselves, which will authorize this court to disturb the settlement, as made in the orphan's court; even if that could be done in this incidental way. I have discovered no evidence of fraud or mistake. That the account of the executors may be of doubtful character, and that Richard was sick and unable to attend when the settlement took place, and therefore had no opportunity of examining the account, furnishes no sufficient ground for this court to interfere. It must be taken for granted that the proper accounting officer did his duty, and was careful to see that all the items were properly vouched or proved. The balance in the hands of the executor of Robert Conover, if not embraced in the general account, is to be added to the general balance in the hands of the surviving executors of Theodorus and William.

Let it be referred to a master to take an account, 1. Of the amount of the charge on the land, with interest; 2. Of the amount of the rent due, on the principles above laid down; 3. Of the amount of the residuum due the defendant, Richard Conover; and, 4. Of the amount of the judgment due Job Throckmorton, one of the defendants.

In case the property has to be sold, the direction of the court, is that the residuary share due to Richard shall be deducted from the sum charged on the land, and that the land be held chargeable in the first place for the balance, after making such deduction; and that the part of the land which remains unsold be first liable, and the other part be resorted to only to supply a deficiency: that the amount of the Throckmorton judgment be next satisfied; and then the amount that may be due the complainants for rent, as ascertained by the master.

No formal application was made for the consolidation of these two suits, though the matter was considerably debated at the hearing; and perhaps it might not be proper to make any order to that effect at this time. But I would recommend it to both parties, as a measure that will save much cost and delay. There appears to me to be great difficulty in bringing them to a separate conclusion. The accounts of the executors, embracing both estates, will have to be unravelled, and separate statements made. The two inventories were not of the same amount; the

debts and expenses were not equal in both cases, and of course the residuum in each case will be different. Under the impression, and I think a correct one, that the parties interested were the same under both wills; that their rights were the same, and that no possible change of circumstances could vary them; all the proceedings have been, as it were, joint proceedings, up to the filing of the bills in these cases. The complainants were not only at liberty to proceed as they did by separate suits, but prudent and correct in doing so; yet it appears to me that great benefit will result by consolidating them at this time, so that one investigation and report of the master, and one decree, may settle both.

CITED *in Morse* v. *Oliver*, 1 *McCar.* 262; *Way* v. *Bragaw*, 1 *C. E. Gr.* 217; *Burnham* v. *Dalling*, *Id.* 312.

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## JOSEPH SHANNON v. JOHN MARSELIS ET AL.

After a mortgage is given, the ultimate payment thereof cannot be defeated by any conveyance of the mortgaged premises that may be made by the mortgagor.

But where new rights or interests have originated since the execution of the mortgage, although the mortgagee is no party to them, and they may delay him in the prosecution of his remedy; yet the court will protect them, and direct the mortgage to be paid out of such parts of the property as may be most equitable to all parties concerned.

Where a mortgagor, after giving a mortgage, sells part of the mortgaged premises to a third person for a valuable consideration; justice demands that the residue of the premises in the hands of the mortgagor should satisfy the mortgage debt; and the purchaser acquires a right, even against the mortgagee, to compel him to have recourse to such residue for the satisfaction of his debt.

If the mortgagor sells a second parcel, this second purchaser acquires rights as against the mortgagor and mortgagee; rights also arise as between the first and second purchasers, as to their liability to the mortgage; all which the court will notice and protect. If the property remaining unsold in the hands of the mortgagor is sufficient to pay the debt, both purchasers will be protected; if insufficient, the last purchaser contributes first, and if there still be a deficiency the first purchaser may be called on: thus the last purchaser is first liable.

It is the policy and duty of the court to settle all claims between the parties, in one suit, if possible; and upon a question arising between two co-defen-

dants, where the matter is distinctly before the court, upon the pleadings and proof between the complainant and defendants in the case, the court will decide the rights of the defendants as between themselves.

The assignee of a bond and mortgage holds them subject to the same equity that existed against them in the hands of the mortgagee.

Where a vendor conveys land by deed with covenant of warranty, which is subject to a mortgage; if the amount of the mortgage is raised out of the premises conveyed, and paid to satisfy the mortgage, the vendee can immediately recover it back, by action against the vendor, on his covenant.

So if the vendor was prosecuting the vendee, on his bond for purchase-money, this court would enjoin him, and compel him to appropriate the money so as to discharge the incumbrance against which he had covenanted.

Where a vendor conveys land which is subject to a prior mortgage, by deed, with covenant of warranty; and the vendee gives a mortgage to the vendor for purchase-money, which the vendor assigns to a third person, and a bill is filed upon the prior mortgage, against the vendor, vendee and assignee of the second mortgage; if any part of the premises so conveyed is taken to satisfy the first mortgage, the vendee has a right to have so much deducted out of his purchase-money, or the mortgage given by him for purchase-money, in the hands of the assignee.

Where there is a mere allegation of an outstanding title or incumbrance, this court will not interfere, but will leave the party to his remedy on the covenant; but where there is an eviction, or even an ejectment brought, it will interfere.

Thus where A. and B. were joint owners of two lots, a small lot and a larger lot, and in 1821 gave a mortgage on both lots to M., to secure three hundred and sixty-five dollars: in 1823 B. conveyed his half of both lots to G.; in the same year A. conveys his half of the large lot to G., and G. conveys his half of the small lot to A., whereby A. became sole owner of the small lot, and G. of the large lot; G. having thus become the purchaser of the large lot, by conveyance both from A. and B., the original owners and mortgagors, had a right to throw the payment of the mortgage to M. on the small lot; and that lot must pay it if sufficient, if not the large lot must be resorted to to make up the deficiency.

After this G. sold ninety feet of the large lot to R., and fifty feet to P.; and in 1825 sold the residue to C. Upon this the same right to protection vests in these purchasers. In the event of the small lot being insufficient to pay the first mortgage, those parts of the large lot sold to R. and P. will be protected from sale until the residue sold to C. is disposed of: that being the last sold is first liable.

The residue of the large lot was sold and conveyed by G. to C, with covenant of warranty, and C. on the same day mortgaged it to G. for five hundred and fifty dollars. This mortgage was assigned by G. to E., and on the death of E. passed to his executors. If the small lot prove insufficient to satisfy the first mortgage, and any part is to be raised out of the residue of the large lot, C. the purchaser, by virtue of his covenant, is entitled to have

that amount deducted from his mortgage, given to G. for purchase money, in the hands of his assignee.

In 1827 A. again mortgaged the small lot to V. for one hundred and sixty dollars. V. assigned this mortgage to S. the complainant, who in 1829 also procured an assignment of the first mortgage given to M. in 1821 on both lots, and thereupon filed his bill to foreclose; all the mortgages being yet outstanding. This third mortgage is a lien on the small lot only, and can only come in for the surplus, in case the small lot should produce more than sufficient to satisfy the first mortgage.

This right of the purchasers to protection is not personal, but attaches to the purchaser of the property, whoever it may be; it is connected with the land itself, and passes with it.

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John Marselis and Harman Marselis, being seized of two lots of land in the township of Aquackanonck, and county of Essex, one containing six acres and forty hundredths of an acre, and the other thirty-two hundredths of an acre, mortgaged them both to John Marselis, on the 1*st day of September*, 1821, for three hundred and sixty-five dollars.

On the 13*th May*, 1822, *Harman Marselis* conveyed his moiety or one half part of both lots, or the equity of redemption therein, to *Henry Griffin*, for two hundred and nine dollars.

On the 1*st August*, 1823, *John Marselis* conveyed his moiety or one half part of the larger lot (six acres and forty hundredths of an acre) also to *Henry Griffin*. Griffin thus became the legal owner of the whole of the larger lot, and of one half of the smaller one, subject to the mortgage to Marselis.

On the same 1*st August*, 1823, *Griffin* conveyed all his interest in the smaller lot (thirty-two hundredths of an acre) to John Marselis, whereby he again became the legal owner of the smaller lot. While owning the larger lot of six acres and forty hundredths of an acre, Griffin sold from it a lot of ninety feet to Robert Morrell, and another lot of fifty feet to Paul Vanderbeck.

On the 24*th September*, 1825, Griffin sold the lot of six acres and forty hundredths of an acre to *Robert Carrick*, for eight hundred dollars; excepting out the two small parcels he had before sold to Morrell and Vanderbeck.

On the *same day*, *Carrick* gave a mortgage to *Griffin* on the same lot, for five hundred and fifty dollars. This mortgage was

afterwards assigned by Griffin to Morrell, and by him to William Ellison, whose executors now hold it.

On the second day of August, 1827, *John Marselis* gave a mortgage to *Adrian Vanhouten*, on the smaller lot, for one hundred and sixty dollars, and Vanhouten afterwards assigned it to Shannon, the complainant.

And on the 2d March, 1829, Shannon procured from *Marselis* an assignment of the original bond and mortgage given by John and Harman Marselis on the whole property in 1821.

All the mortgages are outstanding. This bill is filed by Shannon, the assignee of the *first* and *third* mortgages, for a foreclosure and sale of the mortgaged premises. The executors of Ellison, who hold the *second* mortgage, are made parties, as well as all others interested.

Morrell and Carrick, the purchasers, and the executors of Ellison, answered. The cause was heard on the bill, answers and proofs.

*B. W. Vandervoort*, for the complainant. This case presents important questions as to the rights of these several mortgagees and purchasers. We insist that the whole premises, the small lot and the large lot, are liable to satisfy the first mortgage, and ought to contribute in a ratable proportion, according to the value of the property. Where lands are mortgaged for the payment of a debt, the burden should rest on every part: 3 *P. Wms.* 98, 99; 1 *John. C. R.* 55, 409, 425; 2 *Atk. R.* 383; 1 *Bro. C. C.* 92; 2 *Bro. C. C.* 219; 3 *Wils. R.* 275; 2 *Blac. C.* 160, (*n.* 4); 6 *Ves. jr.* 328. John Marselis and Harman Marselis were tenants in common of both lots; each had a right to convey his own moiety. They were both liable, and by the mortgage each of their shares was charged with the mortgage debt. We insist that the purchasers under them stand in the same situation, and that the subsequent purchasers are equally bound.

The defendants set up the principle, that where there is a conveyance of part of the mortgaged premises, the residue must first be exhausted to satisfy the mortgage. This would operate injuriously on John Marselis. He owns the small lot: is that to be charged with the whole amount of the first mortgage, when the

large lot was equally bound? If John Marselis, individually, had owned the whole property at the time the first mortgage was given, the principle contended for might apply; but as he was the owner of a moiety only, and liable for a moiety of the mortgage debt, we insist that it does not.

If the first mortgage is to be charged wholly on the small lot, and the large lot is to be exempt, the whole proceeds of the small lot may be exhausted to satisfy the charge; and the *third* mortgage, given on that lot alone, and now held by the complainant, defeated. Carrick sets up, that he had no actual notice, but only constructive notice, of the first mortgage. That is sufficient. We contend that the true course would be, that the whole of the mortgaged premises should contribute proportionably to satisfy the first mortgage, and the surplus proceeds of the small lot be applied to satisfy the third mortgage. This would be equal justice to all.

*E. Vanarsdale, jun.*, for Robert Carrick. The complainant, holding the first and third mortgages, seeks to make both lots contribute to pay off the first mortgage, and then apply the surplus proceeds of the small lot to the payment of the third mortgage; by which he might get his money on the first and third mortgages, and exclude the second. This would do injustice to purchasers, and to the holders of the second mortgage. The cases cited for the complainant, however correct in principle, do not apply here. We insist that the complainant must first resort to the small lot, which the second mortgage does not cover, to satisfy the first mortgage. On the principle of two liens, or a lien on two properties, Griffin or his assignees can only take one lot, the large lot, having a lien on that only. The complainant must resort to the small lot to satisfy the first mortgage. Carrick is a subsequent bona fide purchaser, and entitled to protection: 19 *John. R.* 486, 492; 1 *John. C. R.* 412; 4 *John. C. R.* 17; 7 *John. C. R.* 174, 184; 1 *Hopk. R.* 460.

If the small lot be sold and bring enough to satisfy the first mortgage, it is well; if not, then the question arises between Carrick as purchaser, and the executors of Ellison as assignees of the mortgage on the large lot. As to this, the matter is fully before the court, and they will do justice to all parties, even be-

tween co-defendants: 2 *Sch. and Lef.* 709, 718; 2 *Ball and Bea.* 271.

Griffin sold to Carrick, and gave a warranty deed for the large lot, when he took the second mortgage. The covenant of warranty must be fulfilled before the mortgage is paid: 1 *John. C. R.* 301; 3 *P. Wms.* 306. It is true, the mortgage has got into the hands of the executors of Ellison; but they are assignees of Griffin, and stand in no better situation. The assignee of a bond and mortgage, takes it subject to all the equity of the mortgagor: 1 *John. C. R.* 479, 499. Carrick admits he gave the second bond and mortgage, and that all the money is due upon it; but insists, that if his lot has to pay any part of the first mortgage, so much should be deducted out of his mortgage in the hands of the executors of Ellison.

*P. Dickerson*, for Morrell and the executors of Ellison. The interest of my clients and Carrick are identical as to the first point; that is, that the small lot should be sold first, to satisfy the first mortgage. As between Ellison and the complainant, the case is this: two men mortgage, and then sell off a part of the mortgaged premises. We say that the part retained ought to be first sold and applied to satisfy the mortgage. The fact that the mortgagors held as tenants in common, cannot alter the principle.

Morrell's case is peculiar: he first purchased of Griffin a part of the large lot; another part was sold to Vanderbeck, and the remainder to Carrick. If the small lot is insufficient to pay the first mortgage, we insist that the residue of the large lot which was last sold, to Carrick, should be first applied to satisfy the deficiency.

The counsel of Carrick call upon the court to settle, incidentally, the matter between Carrick and the executors of Ellison. How can this be done? It is not in issue. The case in *Scho. and Lef.* shows that the matter must come up on the pleadings between the complainant and defendants, not between two defendants alone. We apprehend this matter cannot be settled in the present case.

*T. Frelinghuysen*, for the complainant. Here are three mortgages; the first covers both lots, the second covers the large lot, and the third the small lot. According to the defendants' doctrine, the third mortgage must be cut off. The two Marselises, who gave the first mortgage, were tenants in common; their title was several; and although they joined, it was the same as if they had given several mortgages to secure the same debt. Harman Marselis sells out his moiety of both lots to Griffin. Griffin then stood in his shoes. John Marselis and Griffin became tenants in common; each owned half of the mortgaged premises, and each half was equally pledged for the payment of the debt. Harman Marselis, by his sale to Griffin, could not throw the whole burden of the mortgage on the moiety of the property belonging to John. It is not the case of a mortgagor selling a part of the mortgaged premises and retaining the residue; but of two joint mortgagors of their several property, and one of them selling out his whole share of the mortgaged premises to a third person: in such case the purchaser must take it subject to the mortgage. It is said that Griffin afterwards made conveyances, but he is not the mortgagor; the doctrine does not apply to the vendee of the mortgagor: it is a personal equity, confined to the mortgagor only.

It is insisted that there are two funds: that the junior creditor has a lien on one only, and therefore the court are to regulate the distribution. The general principle in such cases is a salutary one, but *third persons* are not to be injured. The contest must be between two creditors: here are three creditors, and the adjustment must be on different grounds. The answer does not make out a case in which the court can apply the rule. If a third creditor is to be affected, we insist, the rule cannot, and ought not to be applied. If we are wrong here, there is another principle that ought to relieve us. Griffin became possessed of both moieties of the large lot; the tenancy in common, the interests and responsibilities became united in him. The half of that lot, at least, was liable in his hands; and he could not exonerate it by conveying to John Marselis the half of the small lot. It presents a new case. Again, we have regard to the registry

of mortgages; the property ought to contribute ratably, and the only safe rule is the equity springing out of the records.

The Chancellor. There can be no difficulty or question as to the right of recovery on the part of the complainant, so far as the first mortgage is concerned. That mortgage covers the whole property, which is abundantly able to satisfy it. The question is, in what way shall it be satisfied, consistently with the equitable rights of third persons having subsequent vested interests.

Carrick, one of the defendants, owning the six acres and forty hundredths of an acre lot, contends that the first mortgage should be raised or satisfied out of the smaller lot, to the exclusion of the larger; and that the larger lot should only be resorted to in case of a deficiency. He sets out in his answer, that when he purchased of Griffin, and gave the mortgage to him which is now in the hands of Ellison's executors, he was totally ignorant of the incumbrance that was upon it, in the hands of Marselis; that he took a deed with covenants of warranty; and that, if any of the proceeds of the six acres and forty hundredths of an acre lot should be wanting to satisfy the first mortgage, that it must be deducted from the amount of the mortgage given by him to Griffin, and which is now in the hands of Ellison's executors, as assignees of Griffin; and upon those principles proffers his readiness to pay what is equitably due on the first mortgage, after the smaller lot is first appropriated to its discharge.

Robert Morrell, another of the defendants, also contends, that the small lot should first be sold to pay the original mortgage, and that the larger lot should be resorted to only in case of a deficiency; and in such case, that the part of the lot which he purchased of Griffin should not be sold, until the part which still remains in Carrick's possession is disposed of.

The executors of Ellison agree with Carrick and Morrell, that the smaller lot must first be sold and appropriated, and in case of a deficiency that the six acres and forty hundredths of an acre lot be sold to pay the balance; but they deny the right of abatement set up by Carrick, and insist that the residue of the proceeds of the six acres and forty hundredths of an acre lot ought

to be appropriated to the discharge of their mortgage, without any deduction.

On the other hand, the complainant insists that the doctrine of contribution set up by the defendants is altogether too refined, and cannot apply to this case; that all the mortgages were recorded regularly, and if there is any loss it should be borne ratably.

These various conflicting interests and claims, it is the province and pleasure of this court to settle among all the parties, on just and equitable principles.

As to the first mortgage, it appears to me there can be no difficulty. Both lots are bound for the payment to the mortgagee or his assigns, and the ultimate payment cannot be defeated by any sale or conveyance that may be made of them by the mortgagors. Nevertheless, where new rights or interests have originated since the execution of the mortgage, although the mortgagee is no party to them, and they may tend to delay him in the prosecution of his remedy, yet the court will protect them; and will direct the mortgagee to be paid out of such parts of the property, and in such way, as may be most equitable to all parties concerned.

Where a man gives a mortgage upon his property, and after having done so sells a part of it to a third person for a valuable consideration, justice demands that the residue of the mortgaged premises, in the hands of the mortgagor, should satisfy the mortgage debt; and the purchaser acquires a right even against the mortgagee, so far as to compel him to have recourse to such residue for the satisfaction of his debt, if it shall be sufficient for that purpose. If the mortgagor sell a second parcel, the second purchaser immediately acquires rights as against the mortgagor, and also as against the mortgagee, and rights also accrue immediately between the first and second purchasers, as to their liability to the mortgagee; all of which the court will notice and protect. If the property remaining unsold in the hands of the mortgagor is sufficient to pay the debt, both purchasers will be protected. If insufficient, the last purchaser contributes first, and if there be still a deficiency, then the first purchaser may be called on and is liable. Thus the last purchaser is always first liable. This is the settled rule of this court, and is founded on plain principles of justice.

Apply the rule to this case, and it appears that the first mortgage must be paid out of the smaller lot, if it will pay it, and if not the larger one must pay the deficiency.

Harman Marselis and John Marselis were the owners of the mortgaged premises, and made the mortgage to Marselis, which is known by the name of the *first* mortgage. They were tenants in common. By separate conveyances, and at different times, they sold their interest in the larger lot, to Henry Griffin, so that on the 1st of August, 1823, he was the purchaser of that lot for a valuable consideration, having title from both. He then had a right to protection, and to throw the mortgage debt upon the residue of the mortgaged premises. Having this right, he sells a small part of the six acres and forty hundredths of an acre lot to Morrell, and a small part to Vanderbeck, and the residue to Carrick. The same right to protection vests in these purchasers; for it is not personal, as was supposed at the bar, but attaches to the purchaser of the property, whoever he may be, and is connected with the property itself.

It was forcibly urged, that however this rule might apply to ordinary cases, it could have no application here; for that the mortgagors were tenants in common; that they had a right to sell at different times, and by separate conveyances, which was the case here; and that it would be unjust, where two tenants in common made a common mortgage, that one might sell out all his interest, and thereby throw the whole burden of the incumbrance upon his co-tenant. There is much justice in the argument, but in the view I take of this case, I am not called upon to decide how far such a state of things might call for a modification of the rule. I do not say that when, in 1822, Harman Marselis sold his moiety of the six acres and forty hundredths of an acre lot to Griffin, he thereby threw the mortgage on that part which still belonged to the other mortgagor, his co-tenant; but when, in 1823, John Marselis conveyed, in like manner, his moiety to Griffin, then he had a complete title from both. It was the same as though there had been but one mortgagor, and he had made the conveyance, or as though both the tenants in common had joined in a common deed; and then it was as between the purchaser and the mortgagors, there accrued an equity in favor

of the purchaser, that the mortgage money should be raised out of the residue of the mortgaged premises unsold.

There is some confusion or uncertainty as to the mode in which the title to the smaller lot has been transmitted. The bill states, that Harman Marselis conveyed to Griffin his interest in both lots, and it states also that John Marselis made to him a similar conveyance of all his interest. But both answers deny that John Marselis conveyed to Griffin the half of the small lot, and as there is no proof of it I take it for granted that the fact is not so. Then Griffin never had such a title for that smaller lot as would place it on the same footing with the other lot, and compel it to contribute ratably to the payment of the mortgage. He had a title for an undivided moiety from one of the tenants in common, the original mortgagors; but as before hinted, it is doubtful whether that could operate to throw the whole burden on the other moiety in the hands of the co-tenant, and if it did not, the exemption attached only to the larger lot. Independently of that, it will be seen, that before any rights accrued to third persons in the smaller lot, it came into the possession of John Marselis, one of the original mortgagors, in whose favor no equity could attach as against those holding other parts of the mortgaged premises under the mortgagors. Whichever way, therefore, it is taken, it appears that the smaller lot is first liable, and that the first mortgage must be satisfied out of that, if it will pay it, and if it will not then the six acres and forty hundredths of an acre lot must be resorted to to make up the deficiency.

In such event, the two small parcels sold by Griffin to Morrell and Vanderbeck will be exempted from sale till that part which Griffin conveyed to Robert Carrick is disposed of, that being the last sold by Griffin, and of course, upon the principle already laid down, the first liable. In this mode the first mortgage will be paid.

If it should be necessary to resort to the larger lot, there is a question arising between Carrick and the executors of Ellison. They are co-defendants. The mortgage held by the executors of Ellison is before the court, upon the pleadings. The executors contend, that the proceeds of the sale of the larger lot, after satisfying the first mortgage, shall be appropriated to pay their

mortgage, given by Carrick to Griffin, and by Griffin assigned to Morrell, and by Morrell to Ellison in his life-time. Carrick, on the other hand, insists, that as he purchased from Griffin with covenants of warranty, if any part of the property conveyed to him is taken to satisfy a prior mortgage, that so much shall be deducted out of the purchase money, or out of the mortgage given for the purchase money, which is the same thing.

This is a matter simply between co-defendants, and it was stated on the argument that this was not the proper time to adjust it; that the rights of these two parties, as between themselves, were not regularly in issue before the court in this suit. I cannot concur in this opinion. It is the policy and duty of this court to settle and adjust all claims between the parties in one suit if possible. In *Chamley* v. *Dusaney and al.*, 2 *Sch. and Lef.* 718, Ld. Eldon, on appeal, said, it was objected to the decree before the court that it was between defendants, and that that was contrary to the practice of the court of equity, because there could be no cross-examination between co-defendants: but he held, that where a case was made between the defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity was not only entitled to make a decree between the defendants, but bound to do so. The defendant being chargeable, has a right to insist that he shall not be liable to be made a defendant in another trial for the same matter that may be then decided between him and his co-defendant, and the co-defendant may insist that he shall not be obliged to institute another suit for a matter that may be there adjusted between the defendants. See also *Harris* v. *Ingleden*, 3 *P. Wms.* 99. Here the matter is distinctly before the court upon the pleadings and proofs. The executors of Ellison claim the whole amount of the mortgage. Carrick insists that, in a certain event, there should be a deduction. He produces before the court the deed from Griffin to himself, with full covenants of seizin and warranty, and against this no counter-evidence is brought forward.

The question then arises, has Carrick any equity against the executors of Ellison, who is the assignee of Griffin? It must be conceded that they hold the bond and mortgage subject to the same equity that existed against it in the hands of the mortgagee;

that is all the equity of the obligor. The principle appears to be well settled: *Coles* v. *Jones and al.*, 2 *Ves.* 692, 765; *Hill* v. *Caillovel*, 1 *Ves.* 122; *Hinton* v. *Benson*, 1 *Plowd.* 497; *Mathews* v. *Walwyn*, 4 *Ves.* 118. In 2 *Johns. Rep.* 612, Kent, sitting in the court of errors, said, speaking of the assignee of a bond and mortgage, that he took them subject to every defence that existed against them in the hands of the obligee: that the obligor could not be prejudiced by the assignment; and that the registry acts had nothing to do in the case. In the case of *Murray* v. *Lylburn*, 2 *John. C. R.* 441, the same judge, sitting in chancery, again recognizes and defends the principle, remarking, that "the assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee." And the master of the rolls, sir Jos. Jekyll, in the case cited from *P. Wms.* says, "that it was incumbent on any one who took an assignment of a bond, to be informed by the obligor, concerning the quantum due upon such bond, which if he neglected to do, it was his own fault, and he should not take advantage of his own laches." See also *Livingston* v. *Dean and al.*, 2 *John. C. R.* 479; *Scott* v. *Shreave*, 12 *Wheat.* 608; *United States* v. *Sturgis, and al.*, 1 *Paine*, 525.

The executors of Ellison, standing them in the place of Griffin, we are to consider whether if Griffin was attempting to enforce this mortgage against Carrick, Carrick would be entitled to any relief in consequence of the outstanding incumbrance, and the covenant in his deed. It is very evident, that if the amount of the mortgage money is raised from Carrick's property, and paid to satisfy the mortgage, that Carrick can immediately recover it back by action on the covenant. There can be no good reason assigned why there should be this circuity of action; but a very good one why there should not; which is, that the money might be lost to Carrick altogether, he having no security but the covenant. If Griffin was prosecuting at law on the bond, this court would certainly injoin him, and compel him to appropriate the money so as to discharge the incumbrance against which he had covenanted. In *Johnson* v. *Gree*, 3 *John. C. R.* 546, where the vendee gave a bond and mortgage to secure the purchase-

money, and an action of ejectment was afterwards brought against him by a person claiming a paramount title, and the vendor brought a suit on the bond and advertised the premises for sale under a power in the mortgage; the proceedings on the bond and mortgage were ordered to be stayed until the action of ejectment was determined, and the farther order of the court. Where there is a mere allegation upon an outstanding title or incumbrance, the court will not interfere, but leave the party to his remedy on the covenant; but where there is an eviction, or even an ejectment brought, it will interpose. In this case the first mortgagee is prosecuting his claim; the second one is before the court and asks to be paid what is due, and also the third. All parties are here, and justice can be done.

That Carrick is entitled to relief I can entertain no doubt. If any part of his property has to be sold to pay off the first mortgage, he is entitled to have the amount deducted from his mortgage to Griffin. In *Jourvill* v. *Narish*, 3 *P. Wms.* 306, it was held, that when a man purchases an estate and pays part, and gives bond for the residue, notice of an equitable incumbrance before payment, though after the giving of the bond, was sufficient to stop payment, and to entitle the obligor to relief in equity against the bond; and this was declared to be the rule, though the purchaser had *actual* notice of the incumbrance before the purchase. The constructive notice furnished by the registry, cannot affect the equity between the vendor and the purchaser; and we have seen that as to it the executors of Ellison stand in no better situation than the mortgagee himself.

It is unnecessary to say any thing as to the third mortgage. It is a lien on the smaller lot only, and can only be paid in case the proceeds of that lot amount to more than sufficient to satisfy the first mortgage.

Let an account be taken of the amount due on each of the mortgages. Let the smaller lot be first sold and the proceeds applied to the first mortgage; and the surplus, if any, to the third mortgage. If the first mortgage be not satisfied by the sale of the smaller lot, let that part of the six acres and forty hundredths of an acre lot in Carrick's possession, be sold to satisfy the residue, and also to pay the balance that may be due on the second

mortgage, after making a deduction of so much as may go to satisfy the said residue on the first mortgage.

Carrick will be at liberty to redeem his property on the principles above stated.

CITED *in Van Waggoner* v. *McEwen*, 1 *Gr. Ch.* 413; *Wickoff* v. *Davis*, 3 *Gr. Ch.* 226; *Jacques* v. *Esler*, 3 *Gr. Ch.* 463; *Glenn* v. *Whipple*, 1 *Beas.* 50; *Gaskil* v. *Sine*, 2 *Beas.* 401; *Woodruff* v. *Depue*, 1 *McCar.* 175; *Long's Ad.* v. *Long*, *Id.* 465; *Weatherby* v. *Slack*, 1 *C. E. Gr.* 493; *Vanderveer* v. *Holcomb*, 2 *C. E. Gr.* 550; *Hill* v. *Davison*, 5 *C. E. Gr.* 229; *Hulfish* v. *O'Brien*, 5 *C. E. Gr.* 230; *White* v. *Stretch*, 7 *C. E. Gr.* 79; *Williams* v. *Winans*, *Id.* 577; *Atwater* v. *Underhill*, *Id.* 606.

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## BOWDOIN DECKER v. MARY CASKEY ET AL.

It is the duty of this court never to do justice by halves, to beget business for another court, or, when a cause is fairly within its jurisdiction, to leave open the door for further litigation here or elsewhere.

It sometimes calls for the aid of a jury, (to ascertain material facts, when the evidence before the court is not satisfactory,) before, by its decree, it closes the door of litigation.

Questions of law and fact (as to the existence and validity of deeds, &c.) may be investigated and tried under the direction of this court, either by a feigned issue, or by an action at law, brought and prosecuted under the direction of this court.

Upon a bill by the assignee of a mortgage, against the heirs and executors of the mortgagor, and the widow and heirs of the father of the mortgagor, for discovery of a deed alleged to have been made by him to the mortgagor for the mortgaged premises, prior to the execution of the mortgage; which deed was not recorded, and was alleged to have been lost or destroyed; and for the foreclosure and sale of the mortgaged premises. The mortgage was admitted by the defendants, and the evidence was sufficient to entitle the complainant to relief against the heirs of the mortgagor; but the validity of the deed, and the title of the mortgagor under it, was denied by the other defendants, who claimed as heirs at law of the grantor; there was some evidence in support of the bill, as against them, but not sufficient to justify a decree against them, and afford the complainant the relief sought. The court would not make a decree for the relief of the complainant against the mortgagor only; but directed an action of ejectment to be prosecuted in the supreme court by the complainant against the defendants, others than the heirs of the mortgagor, to try the questions as to the deed.

Form of *directions* for prosecuting an ejectment in the supreme court, under the direction of the court of chancery, to try questions as to the existence and validity of a deed under which the mortgagor derived title.

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The complainant is the assignee of a mortgage given by William Caskey to Joseph Chandler and David D. Chandler. The defendants are, the widow and heirs of John Caskey, the

administrators of William Caskey, and the heirs of the said William Caskey, who was one of the heirs of the said John Caskey, his father.

The complainant alleges in his bill, that in 1816, John Caskey, being seized and possessed of a farm, in the township of Wantage, in the county of Sussex, did, with his wife Mary, who is one of the defendants, execute, deliver and acknowledge a deed of conveyance in fee simple for the said farm, to William Caskey, his son; and that he, on the 31st day of May, 1819, mortgaged the same to Joseph Chandler and David D. Chandler, to secure the payment of a large sum of money, which yet remains unpaid; that John Caskey and William Caskey are since dead: that the deed from John Caskey and wife to William Caskey has not been recorded, was not delivered to the original mortgagees or the complainant, and that he has it not, and knows not where it is, or whether it is in existence: that the defendants, or some of them, have fraudulently possessed themselves of the deed, and have either concealed or destroyed it, and now pretend that William Caskey never had any right or title other than as tenant at will of his father and one of his heirs; and that the latter died seized of the premises, which thereupon descended to his heirs; and that his widow is entitled to dower, and to hold possession until her dower is assigned to her. The prayer of the bill is for discovery, and the production of the deed, or if lost or destroyed that it may be confirmed and established, and for foreclosure and sale of the mortgaged premises.

Mary Caskey, the widow, by her answer, admits that a deed was signed by her husband to her son William, for the premises; she denies that it was signed by her, and says when signed it was handed to her to be put away in a place of security: that she was told by the scrivener, in the presence of her husband and her son William, to take good care of it; that she and her husband need not give the deed to her son William unless they had a mind to, and that they could turn him off the property whenever they thought fit; thereby giving her, as she alleges, to understand that the property was still in her husband and herself, and not in her son William: that she took the deed into her possession with the knowledge and consent of all parties: that

the deed was never afterwards, with her knowledge, out of her custody, until some time after the decease of her husband, and before the decease of her son, she destroyed it as she supposed she had a right to do, conceiving it to be of no value, and fearing an improper use might be made of it: that her husband, when the deed was executed, was incompetent to dispose of his property; and she insists she is entitled to dower.

Margaret Caskey, one of the daughters of John Caskey, in her answer, says, she was present and saw the deed from her father to her brother signed. After it was signed the scrivener handed it to her father or her mother, and told her mother to take care of it; that if William did not use them well, they could turn him away at any time, for the land was theirs; William being present and making no reply or objection. She is well satisfied the deed was not at that time delivered to William; that it was destroyed by her mother some time before her brother's death, and had never, so far as she knew or believed, been out of her mother's custody: that her mother, when she took the deed, put it in a drawer, where she frequently afterwards saw it. Her father was then incompetent, as she conceived, to make a discreet disposition of his property, and took no more interest or concern in it than a child. That she had some knowledge that a mortgage was afterwards given by William: that one day when her mother was out, and she in the cellar at work, hearing some strangers talking above, she went up, and found William and his wife, David D. Chandler, and Robert Carr, esquire, sitting around a table with some papers. Her father was in the room, but appeared to know nothing of what was doing, and did not at that time even know the names of his children. She insists that William never had any right or title under the deed, that the mortgage is void as to her, and that she is entitled to part of the premises.

John Caskey, Thomas Caskey, and John Z. Drake and Sarah his wife, filed an answer. They admit to have heard that, about the time mentioned in the bill, there was a deed made out for the property then owned and possessed by John Caskey, in favor of William Caskey, and that it was signed by John Caskey and was given to his wife without having been delivered to

William, and was afterwards destroyed by her; but deny all personal knowledge of these matters, and cannot say whether the information they have received was true. That they believe John Caskey, at the time of the execution of the supposed conveyance, was not competent to dispose of his property. They insist, that as against them, the said writing is void; that William had no title under it, and they, as heirs of John Caskey, are entitled each to a share of the premises.

Richard Caskey, another of the sons of John Caskey, by his answer, neither admits nor denies the allegations of the bill, and says he knows nothing of them from having long lived at a distance and out of the state, and insists upon nothing on his own behalf.

Some of the other defendants, being infants, have by the clerk of the court, as their guardian, ad litem, filed an answer in the ordinary form.

The other defendants have filed no answer.

Witnesses were examined, and the cause heard before chief justice Ewing, called to sit with the chancellor, who had been of counsel with one of the parties.

*T. C. Ryerson*, for the complainant;

*W. T. Anderson*, for the defendants.

At the present term, the following opinion was delivered:—

Ewing, C. J. The evidence in this cause is quite sufficient to establish the allegations of the bill, and to entitle the complainant to relief against the heirs of William Caskey; for he made the mortgage in question of the whole premises to Joseph and David Chandler, by whom it was assigned to the complainant.

The evidence, in connexion with the answer of Mary Caskey, the widow of John Caskey, is stronger against her than against the remaining defendants, as she acknowledges that she destroyed the deed, alleged by the complainant, and which she admits was signed by her husband. The *odium spoliatoris* has an

operation against her, which does not reach or affect them. Whatever might have been her opinion of the validity of the deed, or her estimate of its value, other persons were interested in it at the time she destroyed it; and she ought in justice to them to have preserved it, which, if invalid, would have given it no strength; or at least, before she destroyed it she should have warned them of her intention, and enabled them, by subjecting it to the inspection of disinterested persons, to obtain and secure thereby such evidence as their rights might have required or their interests demanded.

There is some evidence in support of the bill of complaint as to the other defendants, and yet there is not, in my opinion, sufficient evidence to justify a decree against them, and to afford the complainant the relief he seeks. On the relative weight of the evidence, I think it proper at present to express no opinion, from the course I have concluded I ought to recommend to the chancellor.

In the first place, I think there is some evidence of the material allegations of the bill, independent of the admissions in the answers, which ought to operate against those persons only by whom they were made. David D. Chandler testifies, that he had seen a deed from John Caskey to his son William, for the tract of land contained in the mortgage; that he had seen it in the possession of William, and that he drew the mortgage from that deed; that the deed was signed, as he recollected, by John Caskey and his wife, and acknowledged before Robert Carr, esquire, a commissioner for taking the acknowledgment and proof of deeds; that he examined the acknowledgment on the deed at the time he drew the mortgage, for the purpose of seeing whether it was properly done, and he thinks it was in the usual form, and supposed it was correctly done. The deed, he said, was a warranty deed, in the ordinary form of a deed of bargain and sale, with a money consideration. He farther testified, that William had been in possession of the premises from the year 1817, claiming them as his own. It appears, also, that William erected a dwelling-house on the farm, there being already one there in which his father and family lived, and also that he bought a barn and moved it on to the farm from an adjoining lot.

In the second place, there is not, as I have said, evidence sufficient, in my opinion, to justify the decree the complainant seeks. William lived on the farm, it is true, but so did his father and family up to the time of his decease. The management of the farm by William, may have resulted from the feeble and infirm state of health of his father. William told James Evans, one of the witnesses, there was a deed made out for him, but that the old people had possession of it, and that if he lived with them, and took good care of them while they lived, when they were done with it he was to have it. This information was given to Evans before the mortgage was made. The mother is living, and of course she is not yet done with it, yet the complainant seeks by his mortgage to foreclose and sell her interest, as well as the residue of the premises. William Caskey farther told Evans, on his death-bed, that when he got the deed to make out the mortgage, he took it from his mother's drawer, and when he had done with it he returned it again. David D. Chandler, who drew the mortgage, does not contradict this statement, although he does not directly declare or corroborate it. He got the deed of William, took it to his own house and there drew the mortgage; but he went to the old man's house to get it, and got it there, and whether William had then moved to the other house, or yet lived with his father, he did not remember. David D. Chandler says the deed purported to be signed by John Caskey and his wife, but he was unacquainted with their signatures, having never seen either of them write. He says it was in the ordinary form of a deed of bargain and sale; but what estate was conveyed by it, whether in fee simple, or for life, or for years, he does not say. If either of the two latter, it might yet have been in the ordinary form. If it be said, it may be presumed Mr. Chandler meant a bargain and sale in fee simple, I answer he has not said so, as he might readily have done if he intended it, and I do not feel authorized, therefore, to raise such a presumption and act on it. Mr. Chandler speaks nothing of the delivery of the deed. He says he examined the acknowledgment, and thinks it was in the usual form, and supposed it was correctly done; but he says he did not become a commissioner until the year after, and he was not clerk of the county until a subsequent time, and how far he

might then have been competent to judge of the correctness of an acknowledgment we have not the means to ascertain. Moreover, what was the usual form? How often do we see acknowledgments wholly defective? Why did he not state what the form was, and thus enable this court to judge whether it was apt and sufficient? If the reason is, because he could not remember the form, ought then what he says to suffice as evidence to establish so important a point? I am not willing to affect the rights and interests of these parties upon such vague testimony.

Under these views and impressions of the cause, the question recurs, what ought to be done? I am unwilling to recommend to the chancellor, at present, to make a decree for the relief of the complainant as against the heirs of William Caskey only; because it is the desire as well as the duty of this court, never to do justice by the halves—never merely to beget business for another court—and never, when a case is fairly within its jurisdiction, to leave open the door for litigation farther or in any other place, if it can possibly be here closed. It sometimes calls for the aid of a jury before by its decree it closes the door of litigation, and such I believe is now the proper procedure. If a decree against the heirs of William, as to the whole premises, or as to William's share as an heir of his father only, were now to be made, and the bill be dismissed without prejudice as to the rest of the defendants, the complainant would be left to seek his claims as to the rest of the premises, or as to the other parties, in another suit or in another court, and they would be exposed to further litigation. The questions of law and fact as to the existence and validity of the deed, so far as respects the widow and the other heirs of John Caskey, may be investigated and tried under the direction of this court, either by a feigned issue or by an action at law brought and prosecuted under the order of this court, to which resort is frequently had on proper occasions: *Newland on Ch. Prac.* 350. The proceeding by action is in the present case, in my opinion, more convenient and eligible than a feigned issue.

I do, therefore, respectfully recommend to his excellency the chancellor, to direct by interlocutory order, that an action at law in ejectment be brought and prosecuted in the supreme court by

the complainant, in the name of John Den, as his lessee; that in this action the plaintiff declare for nine undivided tenth parts of the premises in question; that the defendants in this cause, excepting the administrators and heirs of William Casky, do appear thereto, and be made defendants therein, upon the exchange of the consent rules; that the issue to be joined be tried in the circuit court in and for the county of Sussex; and upon the trial, besides the ordinary confession of lease, entry and ouster, the defendants do admit themselves to have been in the possession of the premises demanded at the commencement of the action of ejectment; and also, that on and before the first day of November, in the year of our Lord one thousand eight hundred and sixteen, the said John Caskey was seized in his demesne as of fee, and possessed of the premises in question: that upon the return of the postea in the said action into the supreme court, the same be duly certified into this court; that either party be at liberty, pending the said action, to apply to this court for directions therein, if need be; and that all further equity, and the matter of costs, be reserved for a farther hearing, and for the final decree of the court of chancery in this cause.

The subscriber, called by his excellency the chancellor to sit with him in the aforesaid cause, in which he had been concerned as counsel of one of the parties, respectfully submits to him the foregoing opinion. Dated 20th September, 1831.

CHARLES EWING,
Ch. Just. Supreme Court.

CITED *in* *Brunded* v. *Walker*, 1 *Beas.* 142; *Williams* v. *Winans*, 7 *C. E. Gr.* 577

JONATHAN HILL v. JOHN WHITE AND WIFE, THE EXECUTORS OF CATHARINE J. MILLER, ET AL.

The first mortgagee having prosecuted his bond to judgment and execution at law, under which he purchased the mortgaged premises at sheriff's sale, took possession and received the rents and profits. The second mortgagee is entitled to redeem, upon paying the principal and interest of the first mortgage, together with the costs incurred in obtaining the possession; deducting thereout the rents and profits received, or that with reasonable diligence might have been received by the first mortgagee while in possession.

In such case, it is not the practice to allow interest on the cost; nor can any thing be allowed for renting and taking care of the property, or for any thing except necessary repairs.

There having been an offer to redeem, and the money tendered before suit brought, but the conduct of the mortgagee in possession, in not receiving, not appearing to have been improper or vexatious, each party ordered to pay their own costs.

In 1818, John White and wife gave a mortgage to Catharine J. Miller, for two hundred dollars, on a lot of land in Hardwick; and in 1822, they gave another mortgage on the same property to the complainant, Jonathan Hill, for one hundred and fifty dollars. In 1826, Catharine J. Miller prosecuted her bond to judgment and execution, and became the purchaser at sheriff's sale, and took possession, and has since that time been in possession, receiving the rents, issues and profits. The complainant filed his bill to redeem, on payment of what was justly due to the first mortgagee, who is in possession under the purchase; or to have the property sold and the money equitably distributed.

A question arose as to what the first mortgagee was entitled to; whether she could rightfully claim the costs at law to which she was subjected in getting possession; and if so, whether she was entitled to interest on the costs, and to compensation for renting and taking care of the property.

The case was argued by

*T. C. Ryerson,* for the complainant

*W. T. Anderson,* for the defendants.

THE CHANCELLOR. The complainant is unquestionably entitled to redeem. He must pay the principal and interest of the first mortgage, deducting thereout the amount of the rents and profits received, or that might with reasonable care have been received from the property by the first mortgagee while in possession. He must pay the costs incurred in obtaining possession: *Davy* v. *Baker*, 2 *Atk.* 2; 1 *Pow.* 338; but it is not the practice to allow interest on the costs: 1 *Pow.* 189; 3 *Pow.* 921. Nor can any thing be allowed for renting and taking care of the property. No allowance can be made for any charge of that kind, except for necessary repairs.

Let it be referred to a master, to take an account of the rents and profits from the time Catharine J. Miller took possession, and also an account of the principal, interest and costs due on her mortgage; on payment of which, a proper assignment must be made, under the direction of the master.

As to the costs of this suit, the opinion of the court is, that no costs be allowed to either party as against the other; and this, on account of the alleged offer to redeem, and the tender of the money before suit brought. If the conduct of the mortgagee in possession had been improper and vexatious, in not receiving, I should have ordered costs paid to the complainant; but as that does not appear to have been the case, I think it equitable that each party pay his own costs.

CITED *in Bigelow* v. *Cassedy*, 11 *C. E. Gr.* 560.

ABRAHAM SHAVER, JOHN STINSON, AND AL. v. PHILIP SHAVER.

The vested right of a legatee, upon his death, is transmitted to his personal representatives.

The next of kin are not the personal representatives, and cannot, as such, come into court representing the ancestor.

Where a legatee died before receiving his legacy, without a will, and there had been no administration; a bill filed by his next of kin, to recover the amount due on the legacy, held bad on demurrer: such a claim could be properly made only through the medium of an administrator.

The next of kin may come into this court seeking their rights against administrators, calling them to account, or seeking a distributive share of the intestate's estate. They have a direct interest, which they may lawfully assert.

After payment of debts, the administrator is a trustee for the benefit of the next of kin, alone; and they may proceed against him directly for what is due them.

The power of the administrator is over all the estate, not only for the purpose of paying debts, but for the purpose of distribution; and if he come into court, on good ground of equity, seeking to recover assets, the court will aid him; without enquiring whether they are to be appropriated to pay debts or to be distributed among the next of kin.

Frederick Shaver, late of the county of Sussex, made his last will and testament on the 2d October, 1819, in due form of law to pass real estate. He gave the farm on which he then lived to his son Philip Shaver, the defendant, in these words: "I give to my [son] Philip Shaver the farm I now live on, and to his heirs and assigns for ever, and to have possession after my wife's decease or marriage: and it is my will and order that my son Philip Shaver, six years after my wife's decease or marriage, pay the sum of what the one-fifth part of my farm I now live on would then be worth, which sum of money to be equally divided between my son William Shaver and my son Abraham Shaver." The testator died on the 20th of May, 1823, and his wife died on the 11th of March, in the same year. Philip Shaver accepted of the devise, and entered into possession, and still holds the same under the said will. At the death of the testator William Shaver and Abraham Shaver were living: within six years after the death of the wife, to wit, on the 6th January,

1829, William Shaver died intestate, and without wife or issue.

Philip paid to Abraham, after the expiration of the six years from the death of their mother, three hundred and thirty-six dollars, being his proportion of the money to be paid by Philip, as directed by the will.

The bill alleges that William Shaver had, at the time of his death, other estate more than sufficient to pay his debts, out of which the debts have long since been paid; and it is brought by the complainants, as next of kindred, to recover the amount due to them, on the ground that it is not only a charge upon the land so devised as aforesaid, but that the said Philip is also personally liable to pay to them the said sum of three hundred and thirty-six dollars, except that part to which he is himself entitled as one of the next of kin.

To this bill there is a general demurrer.

The case was argued by

*Scudder*, for the complainants;

*I. H. Williamson*, for the defendant.

Cases cited:—1 *Atk. R.* 502; *Prec. in Ch.* 290; 2 *Vern. R.* 617, 424; 2 *Ventris R.* 366; 1 *Vern. R.* 204, 321; *Amb. R.* 169; 2 *Pen. R.* 758–9; 1 *Bro. C. C.* 119.

THE CHANCELLOR. The complainants come into court as next of kin, claiming the amount said to be due them from the defendant. And the first inquiry is, whether they are entitled, as such next of kin, to come in and make their demand; even admitting that William had a vested right to the money. William died without a will, and there has been no administration, consequently there are no personal representatives.

When the point was first raised, it appeared to me that there must be administration, and that the claim could be properly made only through the medium of an administrator. Respect for the opinion of the learned counsel who drew the bill, induced me to pause and examine; and having done so, I am now satisfied

that the bill cannot be sustained in its present shape. If there was a vested right to the money in William at the time of his death, it was of course transmissible; and all the authorities, as well as the reason of the thing, show that such rights are transmitted to the personal representatives. Next of kin are not personal representatives, and cannot come as such into court representing the ancestor. If they were permitted to do so, it is conceived that much inconvenience would result from it; more, probably, than can well be foreseen. I have examined the books with some care, and have not been able to find a single case or principle to support the present proceeding. There are many instances, it is true, in which the next of kin, as such, come into this court pursuing their rights against administrators, calling them to account, or seeking a distributive share of the estate of the intestate: but their right to do so rests upon very plain principles. The administrator, in such cases, is accountable to them, and them only. They have a direct interest, which they may lawfully assert. After the payment of debts, the administrator is a trustee for their benefit alone, and they may proceed against him directly for what is actually due them. But in this case the complainants seek to get in their hands the moneys of the estate or of the intestate, not from the administrator, but from some third person in whose hands the property happens to be; and to get it, not for the purpose of paying debts, or applying it in a course of administration, but of appropriating it directly to their own use.

The difficulty appears to have been foreseen by the counsel of the complainant: and to avoid it, he has stated in the bill that all the debts of the intestate are fully paid. And the demurrer may be taken as admitting that fact as between these parties. Still I cannot consider the proceeding a safe one. If allowed in this case, it must be in all other cases where a similar allegation is made, or where the next of kin choose to come before the court and say that there are no debts, and therefore no necessity for administration. Suppose in such a case, the demurrer overruled. The court certainly cannot take it for granted that there are no debts, or that they have been paid. The rights of creditors, if there should be any, being involved, and the creditors

not being before the court either personally or by representative, satisfactory if not strict proof would be required. How then is it to be proved that there are no debts, or that they have all been paid? By whom, and under what authority, will the payments have been made? What will be proper evidence to show that the proceeding is right, there being neither law nor authority to sustain it? It is easy to see that much confusion would result from such a state of things.

The counsel seemed to suppose that in this case, if there were an administrator, and the debts were all paid, he could have no equity to sustain him, and that an administrator can come into this court for a recovery of assets, only on the ground that they are necessary for the payment of debts. I apprehend this is a mistake. The power of the administrator is over all the assets of the estate, not only for the purpose of paying debts, but for the purpose of distribution. And if he comes here upon good grounds of equity, seeking aid to recover assets, this court will never inquire whether they are to be appropriated to pay debts, or to be distributed among the next of kin.

My opinion is, that the demurrer is well taken. I regret the necessity that impels me to this conclusion, whereby the complainants are necessarily turned round to seek a remedy in another shape. The main question involved in the controversy is one of considerable importance and some difficulty. It is, whether the money directed to be paid to William six years after Philip took possession of the estate, (the same being a charge on the land,) was a vested interest, and transmissible to his representative; or whether, in consequence of his death before the expiration of the six years, it sinks into the land for the benefit of the devisee. The authorities on both sides are very numerous. I have examined them with attention, but deem it inexpedient, on many accounts, to express any opinion at this time.

Demurrer allowed.

## JESSE BALDWIN v. ELIZABETH JOHNSON AND THE HEIRS AT LAW OF JOHN Y. BALDWIN, DECEASED.

A. and B. were partners in trade. B. having the management of the partnership business, purchased real property with the partnership funds, and took a deed in his own name. Although the conveyance is made to him alone, and the legal title is invested in him, he holds one moiety for the benefit of his partner A.

Although the statute of frauds declares "that all declarations or creations of trusts or confidence," &c. shall be "in writing," this is a plain case of *resulting trust*, and may be proved by parol.

A. and B. agreed to dissolve partnership, upon terms, that A. should take all the partnership property, and pay all the debts; upon which the title deeds were placed in the hands of a scrivener to prepare proper conveyances from B. to A., and A. took the care and direction of the property. The consequence was, that the equitable and beneficial interest, in this real estate, became vested in A.; and B. having received a full consideration for his proportion, became a mere trustee for the benefit of A., as a purchaser: B. still had the legal title, but as between him and A. it could avail him nothing.

After the dissolution of the partnership and deposit of the title deeds with the scrivener, B. gave a bond and mortgage on these lots to C. for eight hundred dollars; on which C. filed a bill for foreclosure against B. alone, without making A. a party; and obtained a decree for sale, which was about to take place, when A. filed the present bill, setting up his equitable title, seeking relief against the mortgage, and an injunction to stay proceedings on the former decree. B., in his answer to this bill, admits the partnership, and the dissolution, on the terms stated; but denies his indebtedness to the firm, and insists that if he was indebted, it was settled by the agreement at the dissolution. As to one part of the property purchased, (the Freeman property,) he admits it was bought with the funds of the company, and considered the property of the complainant and himself; and says the deed was made to him by mistake. As to the other part, (the Baldwin property,) he admits it was sold on an execution at the suit of the firm, that he bought it for the sum due, and took a deed for it in his own name, thereby making himself debtor for the amount of the execution; and says that he considered that property as belonging to himself; and denies that he purchased or possessed it for the use of the company, or that there was any agreement or understanding that this property should be purchased on the joint account, or that he ever agreed to convey it to the complainant. Yet, it appearing that B. had not charged himself with the amount in the partnership books, (kept by him); that in the accounts of stock, taken in several succeeding years, generally in his own hand-writing, and the inventory of the stock of the firm made at the dissolution, this property was included and valued as the property of the firm; that B. had given in this property to the

assessor, and paid taxes on it, several years, and taken receipts therefor in the name of the firm; had paid, and taken receipts, for repairs made on this property, as the property of the firm; had leased the property, and made entries of contracts with tenants, in the books of the firm, in which the property was called "our houses," &c.; had received rents and given receipts in the name of the firm; charged tenants with rents in arrear, in the books of the firm; and treated the property, in all respects, as firm property:—it must be considered as belonging to the firm, notwithstanding the legal title was in B. only.

As to the mortgage, B. in his answer says, it was given for the amount due on a note given by him to C. in 1813, and renewed in 1819, in the name of the firm, for money borrowed for their use. C. in her answer states, that she still held the notes, and took the mortgage as collateral security; that she had always understood that the property was purchased by B. in his own name, and for his own use, and the deeds made to him alone; that she never heard of the renting, the receipt of rent, or the payment of taxes, in the name of the firm, or that there was any trust connected with it, until about the time the present bill was filed. That she did not know that at the time of making the mortgage B. was not in possession of the title deeds, and had no notice of any agreement that they should be delivered up, or the property conveyed to A.; and had not heard of any change of possession, but believed it still to be in possession of the tenants who had rented of B.; and insists that she is entitled to protection, as a bona fide purchaser for valuable consideration without notice; or that, if the property should be found to be the property of the firm, the mortgage should be considered good as to one half; or, if the property should be considered as belonging exclusively to A., she was entitled to an account against the firm, for the money due on the notes, to be paid by A.—But B. never having had exclusive possession, and at the time of giving the mortgage not being in possession of the property by himself or his tenants, the property being understood and reputed by the tenants then in possession to be the property of the firm; and B. not being then in possession of the title deeds, which, if enquired for, he could not have produced; and C. having understood from B. that the title was in him, and rested on his statement without having examined, seen or enquired for the title deeds, or made any enquiry of the tenants in possession, who would have informed her that the property was not the separate property of B., but belonged to the firm, or was claimed as such, or given her such information as to put her on enquiry: her claim to be considered in the light of a bona fide purchaser for valuable consideration, without notice, cannot be sustained.

Every man purchases at his peril, and is bound to use some reasonable diligence in looking to the title and the competency of the seller: it will not answer to rest on mere reputation or belief, unless the party intends to rely on his covenant alone.

*Semble.* C. cannot claim the protection of a bona fide purchaser without notice, because there was no money paid; the mortgage was taken as a col

lateral security, the old notes were not given up, and consequently she was not injured.

The rule is, that a person claiming protection (as a bona fide purchaser) must have paid the money; to have secured it is not sufficient.

B. having made the mortgage without authority, and C. having received it without investigation, relying on the integrity of the mortgagor, when the slightest investigation would have sufficed to satisfy her that he had no right to make it; the mortgage cannot be sustained against A.

If the property, being real property, is to be considered as a tenancy in common, C. had notice, or might have had notice, that the beneficial interest was vested in A., and that B. by his mortgage could not bind or convey any interest in the premises; and the mortgage is unavailing.

Nor is the mortgage available, in equity, against the *moiety* of the property, although the legal title was in B. at the time; as C. had notice, or might have had notice, that it was or had been partnership property; (and the partnership being dissolved,) that B. had no right to make the mortgage.

After the dissolution of a partnership, the authority of an individual partner over the joint stock ceases; he cannot use it for his private benefit, or in any way inconsistent with the closing of the partnership business.

The whole of the partnership property is liable for the partnership debts; if all cannot be paid, they must be paid *pro rata:* this court cannot establish a preference, on the ground of an unauthorized act of one of the partners after the dissolution: the notes, therefore, were not ordered to be paid out of the mortgaged premises.

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This is a bill for an injunction and relief; and the material facts necessary to the correct understanding of the case, are the following:—In March, 1807, Jesse Baldwin and John Y. Baldwin entered into partnership in trade in Newark, under an agreement, that Jesse Baldwin was to furnish a capital of ten thousand dollars in merchandize; to let to the company, without any charge or rent, his store-house in the town; and to let his dwelling-house, adjoining the store-house, to John Y. Baldwin, for two hundred dollars a year, from which was to be deducted one hundred dollars a year for the board of a clerk. John Y. Baldwin was not bound to furnish any capital, but to be equally interested in the profits and losses of the business; and upon a dissolution of the partnership, the dwelling-house, store-house and capital furnished, are to belong to Jesse Baldwin. The business was carried on under the name of John Y. Baldwin & Co., until the 1st of May, 1817, chiefly under the management of John Y. Baldwin, the complainant being in the city of New-York. In May, 1817, the complainant returned to Newark, and finding

the accounts of the partnership in a bad situation, he endeavored to adjust them and bring the partnership to a close, which was not effected, however, until the 1st of January, 1820; previously to which the said John Y. Baldwin had conveyed his real estate, containing about forty-eight acres of land in Caldwell, to his mother-in-law, Elizabeth Johnson, one of the defendants. The partnership was dissolved on the 1st of January, 1820, and John Y. Baldwin was indebted to the firm several thousand dollars. It was dissolved upon an agreement, that Jesse Baldwin was to take all the partnership property and pay all the debts. An inventory was made of the property and debts, and John Y. Baldwin removed from the dwelling-house on the 1st of April following.

During the existence of the partnership, they obtained a judgment and execution against one Esther Baldwin, under which the sheriff of Essex exposed to sale two houses and lots in Newark, and they were purchased for the use of the company, for the amount of the execution. A conveyance was received for the use of the firm, dated 24th November, 1813, and possession taken accordingly; after which, and until the time of dissolving the partnership, it was held and used as partnership property; the taxes were paid out of the funds of the company, and the rents and profits went to their credit and were applied to their business. At another sheriff's sale, two other lots of land, (the property of H. Freeman,) were purchased in like manner, for the use of the company; one of which was afterwards sold, and the money paid to the credit of the company. The sheriff's deeds were executed to John Y. Baldwin alone, and no reference was had in the deeds to the interests of the complainant. At the time of dissolving the partnership, this was discovered, and John Y. Baldwin agreed to execute a conveyance to the complainant. For this purpose the deeds were placed in the hands of an attorney, but the proper conveyance was never made and executed. These lands were inventoried at the time of the dissolution, as part of the partnership property, and valued at two thousand dollars, since which Jesse Baldwin has been in the sole possession of them, and has received the rents and profits.

On the 2d February, 1820, John Y. Baldwin executed a bond

and mortgage to the defendant, Elizabeth Johnson, for eight hundred dollars, covering the lots so sold at sheriff's sale, and purchased for the firm. The mortgage was recorded on the 27th June following.

John Y. Baldwin married the daughter of Elizabeth Johnson. When the mortgage was given John Y. Baldwin was not in possession of the title deeds, and the lots were in the possession of Jesse Baldwin, under the agreement dissolving the partnership, which was known, or might have been known.

Elizabeth Johnson filed her bill to foreclose the mortgage, obtained a decree, and the property was advertised for sale. Jesse Baldwin was no party to the bill, and had no notice of it until the property was about to be sold. Jesse Baldwin called on Mrs. Johnson for explanation. She told him she had lent the eight hundred dollars to John Y. Baldwin, and taken for it the notes of John Y. Baldwin & Co.; of which Jesse Baldwin had until that time no knowledge. They were not mentioned at the time of the dissolution, nor inventoried among the partnership debts.

The bill then alleges, that those notes for eight hundred dollars, were the consideration of the deed from J. Y. Baldwin to Elizabeth Johnson for the Caldwell property, as above mentioned; and also that during the existence of the partnership, J. Y. Baldwin received sundry large sums of money due to the complainant individually; and if Mrs. Johnson did loan eight hundred dollars to J. Y. Baldwin, it went to pay his own debts, and was not used for the benefit of the partnership.

The bill insists that J. Y. Baldwin could not charge the lands with the mortgage as against the complainant; or if he could, that the money, or the whole of it, is not due. It further insists, that the promissory notes given in the name of John Y. Baldwin & Co. are fraudulent, and ought to be delivered up; and in the mean time, that the sale should be stayed.

The answer of John Y. Baldwin admits the partnership, and the dissolution upon the terms mentioned in the bill. He denies his indebtedness to the firm, or if indebted, says it is to a small amount only, which was settled by the agreement at the time of the dissolution. He admits that he conveyed to Elizabeth Johnson, in 1819, his estate in Caldwell, and that the consideration

mentioned in the deed was eight hundred dollars, which was not paid in cash at the time of making the deed; but that at the time he considered himself justly indebted to the said Elizabeth Johnson, who was his mother-in-law, in upwards of the sum of one hundred dollars, for small sums borrowed at different times; and also, as one of the firm of J. Y. Baldwin & Co., in the sum of one hundred and fifty dollars and upwards, for interest on the promissory note she held against the firm. And he alleges that the conveyance was not made to his mother-in-law in the expectation of any difficulties with the complainant; that the lands were not worth the amount, and were incumbered with his step-mother's dower. He admits the taking of the inventory, but says he was not present the whole time it was making out.

As to the property purchased at the sheriff's sale, he says, that the property of Esther Baldwin was sold at sheriff's sale on an execution in favor of the firm; that he became the purchaser for the amount of the execution, and accordingly took a deed for it in his own name; thereby making himself debtor to the firm for the amount of the execution. He denies that he purchased it or possessed it for the company; but says that he may have used the rents and profits, or some part thereof, for the benefit of the firm, and paid taxes with the money of the firm, without crediting or charging himself, as the case might be—all which may appear by the books of the firm. He says further, that there was no agreement or understanding that this property should be purchased on their joint account.

In regard to the other property purchased at sheriff's sale, he admits it was bought with funds of the company, and that he has always considered it as the joint property of the complainant and himself. He denies any fraud or mistake in making out the sheriff's deed of the Esther Baldwin property, but alleges that the other deed was made to him by accident or mistake of the sheriff.

In regard to inventorying the lands, he says it may be so, he has no recollection of it, but denies that he ever agreed to make any conveyance to the complainant of the Esther Baldwin property; that, on the contrary, he refused to do so. He admits that the complainant has been, since the dissolution, in possession,

and in the receipt of the rents and profits of all the said premises, but it has been against the consent of the defendant, so far as respects the Esther Baldwin property.

He admits the bond and mortgage given to Elizabeth Johnson on these premises, and insists that it was given to secure her the payment of eight hundred dollars, which he, as one of the late firm of John Y. Baldwin & Co. had borrowed of her for the benefit of the firm, in May, 1813, and which money was either paid to the complainant, or applied to the use and benefit of the firm or the complainant; that he gave the note of the firm for the money, and in 1819 he renewed the note in the partnership name, and afterwards, to secure the payment of it, gave her the bond and mortgage. He denies the charge of concealment as to the mortgage, but says he does not recollect of having ever acquainted the complainant with the existence of the bond and mortgage or the notes.

The answer of Mrs. Johnson, the other defendant, is very full; but for the proper understanding of the question in this cause, it is only necessary to state in relation to it, that she admits the giving of the deed for the Caldwell property by J. Y. Baldwin to herself in September, 1819. She supposes it worth four hundred or four hundred and fifty dollars, clear of incumbrances. At the time of making the deed, he was indebted to her in one hundred and seventy-six dollars and fifty cents, for interest on the note of the firm, and for some small sums loaned by her to him from time to time. She states there was no previous agreement between herself and J. Y. Baldwin as to the making of this deed. In regard to the property formerly of Esther Baldwin, and also the Freeman property, purchased at sheriff's sale, she always understood it was purchased by J. Y. Baldwin in his own name, and for his own use, and that the deed was made to him alone. She never heard that the rents and profits went to the firm, or that they paid the taxes, or that there was any trust connected with it, until shortly before or about the time complainant's bill was filed. She insists that she was ignorant of any change of possession of this property, as stated by the complainant, and believes it remained in possession of the same tenants that had rented of and held under John Y. Bald-

win; and if there was a constructive possession on the part of the complainant, she had no notice of it.

The answer further states, that she is the mother-in-law of John Y. Baldwin. In 1813 he borrowed of her eight hundred dollars, for the use of the firm, and gave her the note of the firm, which she accepted, payable with interest. The note remained unpaid until May, 1819, when J. Y. Baldwin gave her a new note for the principal sum, in the name of the firm, which was given and received as a mere renewal of the original note. In 1820, and after the dissolution of the partnership, hearing of difficulties between Jesse and John Y. Baldwin, and becoming anxious about the debt, she spoke to John Y. Baldwin on the subject, and he thereupon proposed to mortgage to her the property already mentioned; and believing that it was a sufficient security for the debt, and that it was the property of J. Y. Baldwin individually, she agreed to accept it. She says, that if at the time of making the mortgage, J. Y. Baldwin was not in possession of the title deeds, she did not know it, nor had she notice of any agreement whereby they were to be delivered up to the complainant, or whereby the property was to be conveyed to him. She denies any intentional concealment of the mortgage; and alleges that she took the mortgage, not in lieu of the notes, but as collateral security merely, and that the whole of the principal and interest is due on it, except so far as a part of it may be considered paid by a charge against her on the books of the company, of one hundred and seventy-eight dollars and forty-four cents, and by the real and fair value of John Y. Baldwin's interest in the Caldwell property, conveyed to her as aforesaid. She insists that if the mortgaged property should be found to have been the property of John Y. Baldwin & Co., yet that the mortgage should be considered valid as to *one half*, being J. Y. Baldwin's part; or that, if the property should be considered as exclusively Jesse Baldwin's, yet that she will be entitled to an account as against the company of the money due her on the notes, and to have the same decreed to be paid by the complainant. She denies that she ever intended to treat the debt due her as the individual debt of John Y. Baldwin, and prays that she

may not be affected by any fraudulent transaction on the part of John Y. Baldwin, if any such should be discovered.

Depositions were taken, and the partnership books, documents and vouchers exhibited; the substance of which appears in the opinion of the court. The case was argued by

*E. Vanarsdale*, for complainant.

*J. C. Hornblower*, for defendants.

Cases cited:—5 *Ves. jr.* 193; 2 *Dow's P. C.* 242; 3 *Kent's C.* 14; *Smith* v. *Wood*, ante, 74; 2 *Mad. C.* 112; 1 *Daniel's C. R.* 80; 13 *Ves. jr.* 120; 16 *Ves. jr.* 249; 1 *Meriv. R.* 284; 1 *John. C. R.* 299; *Montague*, 101; 11 *Ves. jr.* 3; 1 *Atk. R.* 538; 3 *Atk. R.* 304, 814; 2 *Freeman's R.* 175; *Finch's R.* 219; 1 *John. C. R.* 575; 4 *Dessan's R.* 286; *Mitf.* 222, (3d edit.); 1 *Ver. R.* 246; 9 *Ves. jr.* 32; 3 *P. Wms.* 281; 7 *John. C. R.* 67; 5 *Mason's R.* 57; 1 *Peters' U. S. R.* 373; *Jeremy*, 446–7; *Fran. Max.* 1; 1 *Ver. R.* 244; 3 *Salk. R.* 84; 2 *Ch. R.* 360; 1 *Ver.* 52; *Eq. Ca.* 354.

THE CHANCELLOR. The great object of the bill is to avoid the mortgage given by John Y. Baldwin to Mrs. Johnson, in 1820, after the dissolution of the partnership; on the ground that, as regards the complainant, it is fraudulent, and therefore cannot be sustained.

The complainant has sought, in the first place, to establish by the evidence, that the property on which the mortgage was given, was at the time partnership property; that although the deeds were given to John Y. Baldwin in his own name, yet that in truth, Jesse Baldwin had in equity an equal interest in the purchase.

So far as regards the property in Franklin street, formerly Hiram Freeman's, the fact is established beyond all doubt. It was purchased at the sale with the partnership funds; and although the conveyance was made to John Y. Baldwin alone, and therefore the legal title vested in him, he held the one moiety in trust for the benefit of Jesse. It is the plain case of a resulting

trust, and may be proved by parol. The fact is admitted in express terms in the answer of John Y. Baldwin. It was afterwards used as the property of the firm. They received the rents, paid the taxes, made the repairs, and every thing that was done in relation to it was in the name of the firm. J. Y. Baldwin alleges that the deed was made to him by mistake; and so far as he is concerned, or his interests brought in question, there can be no difficulty.

As respects the property in Fair street, formerly Mrs. Baldwin's, the case is not so clear. John Y. Baldwin states, in his answer, explicitly, that he considered that as belonging to himself. He admits that he purchased it with the partnership funds, for it was sold on an execution in favor of the firm; but says that he made himself debtor to the firm for that amount, and that in preparing that deed, whereby the property was conveyed to him individually, there was no mistake. He assigns several reasons which induced him to make the purchase for his own benefit; some of them are certainly very plausible, and are rendered the more so by the answer of his co-defendant, Mrs. Johnson. He denies that he held possession of it for the use of the company, or that the same was held and used as partnership property.

I think, however, that the evidence is conclusive to show that this defendant is mistaken in this part of his answer. There are a great variety of facts going to show that the property was always held under the company, and treated by them as their property; and I do not see how it is possible to reconcile these facts with the allegations in the answer. The deed bears date in 1813. In March, 1814, a general inventory was taken of the partnership stock and property, as is customary among merchants. In that inventory is embraced, and in the handwriting of John Y. Baldwin, this property in Fair street, being the same that was Mrs. Baldwin's; and it is valued at one thousand dollars, and footed up with the valuation of the house in Franklin street, which is admitted to be the property of the firm. In December of the same year, the taxes were paid to the town collector. The receipt is drawn by John Y. Baldwin, and is somewhat indistinct; but the property in Fair street is distinguished in it either as the property of the firm, or of Jesse Baldwin, and not of J. Y.

Baldwin. In March, 1815, another inventory of stock, &c. was taken, part of which is in the hand-writing of John Y. Baldwin and part in that of Jesse Baldwin. In this is also included the house in Fair street, valued at one thousand dollars, and that part of the inventory is in the hand-writing of John Y. Baldwin. In the inventory of 1816, also in the hand-writing of John Y. Baldwin, both houses are included. In another inventory, taken in September, 1816, mention is made of two or three houses, which it is presumed has reference to the same ones, but they are not designated, and this inventory appears not to be in the hand-writing of John Y. Baldwin. In January of the same year, (1816,) the direct tax was paid to Seth Woodruff for the year 1815. The receipt, drawn by John Y. Baldwin, is as follows: "Newark, Jan. 28, 1816. Received from Messrs. John Y. Baldwin & Co. the sum of three dollars and thirty-five cents, in full of direct tax for *their house*, lately occupied by Mrs. Esther Baldwin in Fair street," &c. In October, 1816, a receipt was given by Paul Brown to John Y. Baldwin & Co. for a charge in repairing the pump of *their house* in Fair street. This receipt was drawn by John Y. Baldwin. In May, 1816, a similar receipt was given by Job Meeker to John Y. Baldwin & Co. for work done for *their houses* in Fair street. This was also drawn by John Y. Baldwin. In July, 1816, there are sundry entries made in the company's common day book, of contracts made with various persons for renting the houses in Franklin and Fair streets. These entries are made by John Y. Baldwin; and in describing the houses in Fair street, he in every instance, save one, calls them *our houses*. The same book shows that the rents were paid. In 1817, a part of the property was occupied by David Ball. In July he paid the first quarter's rent, and took a receipt from John Y. Baldwin, in the name of John Y. Baldwin & Co. To Mrs. Williams, who occupied another part, a similar receipt was given by Jesse Baldwin for one quarter's rent; and underneath it, on the same paper, are memoranda made of the receipt of the other three quarters. In 1818, David Conger is charged in the company's ledger with twenty-four pounds rent for that year, for the house in Fair street, and this charge is made by John Y. Baldwin. In 1819, Mrs. Williams occupied part of the

house in Fair street, and in July of that year, John Y. Baldwin gave her a receipt for rent in the name of the firm. And in 1820, in the general inventory that was made of the stock and property of the company at the time of the dissolution, the three houses were again included. In addition to this, it is testified by Isaac Nichols, the assessor of the town, that he was assessor from 1817 to 1823; that he was directed by John Y. Baldwin to assess the property in Franklin street and Fair street to the firm of John Y. Baldwin & Co., and that it was so assessed until John Y. Baldwin left the store, since which he has assessed it to the complainant, at his direction.

These facts and circumstances show very conclusively, that not only the house in Franklin street, but the houses in Fair street also, were considered by John Y. Baldwin as belonging to the firm. They were treated by him as such, in all respects. He states in his answer, that he considered himself a debtor to the firm for the amount paid; but I do not find that he ever charged himself with it, or gave any information to his partner that he considered the property as his own.

The result is, that on the 1st of January, 1820, the property belonged to the firm, and must be so considered in this court, notwithstanding the legal title was in John Y. Baldwin. On the 1st of January, 1820, the partnership was dissolved by mutual consent. The terms were, that Jesse Baldwin, the complainant, should take all the property and pay all the debts; and in the schedule then made, the houses in Fair street were considered as belonging to the partnership. From that time the whole management and direction of the property was assumed and exercised by the complainant. He made leases, received rents, and acted in every other respect as owner; and it appears that the title deeds were placed, by common consent, in the hands of an attorney, to have the necessary conveyance prepared, to pass the legal title to the complainant.

After the dissolution, and the agreement upon which it was founded, and as a necessary consequence resulting therefrom, the equitable and beneficial interest in this real estate became vested in the complainant; and John Y. Baldwin, having received a fair consideration for all his proportion, became a mere trustee for

the benefit of the purchaser. He still had the naked title, but as between him and his former co-partner, it could avail nothing.

I do not consider it necessary to discuss the question which has been much agitated in the chancery of England, as well as our country, whether real estate, acquired with partnership funds, is to be considered as a part of the joint stock, and as such must be brought into the common fund; or whether it is to be considered as a tenancy in common, and that the rules of partnership property do not apply to it. For, in this case, independently of any partnership regulations, there was an actual agreement and sale of the estate; and even if we consider these partners as tenants in common in respect of these lands, yet by the agreement and sale, which were made in good faith, and for a valuable consideration, the complainant became entitled, and in equity is considered as owning the whole in severalty.

It follows as a necessary consequence, that after the sale and dissolution, John Y. Baldwin had no right, as against the purchaser, to treat this property as his own. If it were part of the joint stock, his authority over it ceased at the dissolution. He could not use it for his private benefit, nor in any mode inconsistent with the closing of the partnership business: *Gow. on Part.* 253. If it were not a part of the joint stock, then having parted with his beneficial interest, and being a mere trustee, he had no right to interfere with the property of his cestui que trust.

But however true this may be, it does not follow that, because John Y. Baldwin may have acted *mala fide*, therefore Mrs. Johnson has no rights. She comes before the court claiming to be a bona fide purchaser for a valuable consideration, without notice of any fraud or improper conduct on the part of John Y. Baldwin; and claiming as she does under the person having the legal title at the time, she is entitled to great consideration.

The rule of equity touching the rights of a person claiming to be a bona fide purchaser for a valuable consideration, is a very strict one, perhaps too strict; but it is, nevertheless, so well settled, that it ought not to be lightly disturbed. And it does appear to me that the claim of the defendant, Mrs. Johnson, to be considered in the light of such purchaser, cannot be sustained,

She had no knowledge whatever of the pretended title of J. Y. Baldwin. She had understood, and therefore believed, that the title was in him. She placed implicit confidence in his statements. It does not appear from her answer, that she had ever examined or seen, or even inquired for, the title deeds. If inquiry had been made for them at the time the mortgage was given, they could not have been produced. They were in the possession of a third person, for the purpose of preparing a formal transfer to Jesse Baldwin; and that fact could scarcely have been concealed. Every man purchases at his peril, and is bound to use some reasonable diligence in looking to the title and competency of the seller. It will not answer to rest upon mere reputation or belief, unless the party intends to rely upon his covenants alone.

In this case, too, John Y. Baldwin was not in possession, either by himself or his tenants, at the time the mortgage was taken, nor had he ever any separate and exclusive possession. David Ball says he rented of John Y. Baldwin, but that he recognized both him and Jesse as owners or landlords, and paid the rent at the store. David Conger always paid the rent to Jesse after he returned from New-York, and always thought the property belonged to the firm. Such was the common reputation. Mrs. Williams rented of John Y. Baldwin, who said the property was his; but Jesse claimed the rent, and she paid it. Henry Earl hired the house in Franklin street in October, 1819: he hired of Jesse Baldwin, and knew no body else in the transaction. These tenants were in possession in February, 1820, when the mortgage was taken, and it is evident that inquiry from any of them would have given sufficient information to put her upon inquiry. It would have informed her that if it was not the separate property of Jesse Baldwin, it was at least the property of the firm, or claimed as such; and that firm being dissolved, John Y. Baldwin could not execute a mortgage, or give a title for any part of the property. In *Taylor* v. *Hibbert*, 2 *Ves. jr.* 440, Ld. Roslyn says: "I have no difficulty to lay down, and am well warranted by authority and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estate these

tenants have." And again; "It was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the *actual* possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests, as to the extent and terms of which it was his duty to inquire." In *Hiern* v. *Mill*, 13 *Ves.* 120, the principle is expressly recognized. See also *Daniels* v. *Davison*, 16 *Ves.* 254; *Allen* v. *Anthony*, 1 *Meriv.* 282; 1 *John. C. R.* 299. I am aware that these authorities extend only to cases in which the rights of the tenants are concerned. But there is no difference in principle or in reason. The object of the inquiry would be to ascertain the nature and extent of their possession and rights; and the notice would be equally good whether they informed the purchaser of a holding under the vendor or some other person, or whether of a leasehold or a freehold interest. In the case of *Daniels* v. *Davison*, cited before, the person in possession had been a tenant of the vendor, but at the time of the sale and purchase claimed to hold the property under an article of agreement to purchase of the vendor. The court held, that "being in possession under a lease, with an agreement in his pocket to become the purchaser, gave him an equity, sufficient to repel the claim of a subsequent purchaser who made no inquiry as to the nature of his possession." That was, as I conceive, a stronger case than the present. There it was admitted the person in possession was in under the lease, and it was argued that the most the purchaser was bound to take notice of was some leasehold interest; but the court held, that if his title was good as against the purchaser under a lease for forty-five years, it would be good for a greater interest.

I think there is weight in the position advanced by the counsel of the complainant, that Mrs. Johnson cannot claim the protection of a bona fide purchaser, because here there was no money paid; that this was a mere collateral security; that the old notes were not given up, and consequently that the party, in the language of the books, *is not hurt.* The rule undoubtedly is, that the person claiming such protection must have paid the purchase money; to have secured it, will not answer. The court gives protection in the peculiar case, on the ground that it is ab-

solutely necessary; that without it, the money must inevitably be lost: *Wallwyn* v. *Lee*, 9 *Ves. jr.* 32; *Harrison* v. *Heathcote*, 1 *Atk.* 538; 3 *Atk.* 304, *Hardingham* v. *Nicholls; Maitland* v. *Wilson*, 3 *Atk.* 814; *Beekman* v. *Frost*, 18 *John. R.* 562. I have doubts whether this case could be considered within the rule, but I do not find it necessary to decide the question.

The result of my judgment on this part of the case is, that this mortgage cannot be sustained as against Jesse Baldwin. John Y. Baldwin made the conveyance without a particle of authority, and in fraud of the rights of the complainant; and Mrs. Johnson received the mortgage without any investigation, relying entirely upon the integrity of the mortgagor, when the slightest inquiry would have sufficed to satisfy her that he had no right whatever to meddle with the property. I regret this conclusion, seeing that the defendant, Mrs. Johnson, is a female, and probably unacquainted with business; but I am not able to bend the rule to meet her particular situation. I am induced to believe that she has acted honestly in the whole matter, notwithstanding a number of circumstances calculated to excite suspicion, and certainly showing very great incaution. The facts, that in 1819 this partnership note was renewed without any notice to Jesse Baldwin; that in the same year she took a conveyance from John Y. Baldwin of the Caldwell property for a trifling consideration, part of which was to pay the interest due on the note; that soon after, when in consequence of difficulties between the partners she applied to John for further security, and took his individual property to secure the partnership debt, after the dissolution, and without having the mortgage registered; and that of all these matters Jesse Baldwin, though a near neighbor and responsible man had no kind of notice; would naturally lead to a suspicion that there was a studied effort to conceal them from him, unless their disclosure should become actually necessary. If this were the honest debt of the company, there could be no possible motive for concealment. But as the defendant has positively denied any intentional misconduct, I am not at liberty to disbelieve her, and therefore regret the necessity that impels me to take from her the security on which she rested.

It was insisted by the defendant's counsel, that if the mortgage

should not be good as against Jesse, in should be available in equity against the moiety of the property, the legal title of which was in John at the time the mortgage was given. This I think cannot be, without unsettling the principles already established. She had notice, or might have had notice, that this was, or had been partnership property; and the partnership being dissolved, that John Y. Baldwin had no right to make such conveyance. Or if it should be contended, that this being real property, the parties, on the dissolution, held it as tenants in common, then she had notice, or might have had notice, that the beneficial right and interest of John Y. Baldwin was vested in Jesse, and of course that a mortgage would be of no avail. At the time of executing the mortgage, John had no interest to bind or to convey, and the mortgagee can take nothing under it.

It was also contended, that the original notes were given for money advanced to the firm, and that the court ought to hold this property liable for the payment of the debt, before the mortgage is delivered up. I am not disposed to question the original debt, or the liability of the firm to pay it. They are matters with which, as it appears to me, I have no concern; and hence I shall not grant that part of the complainant's prayer which seeks to have the notes cancelled. But I do not see the way clear in ordering the notes to be paid out of this particular fund. The whole property of the partners is liable for the payment of the partnership debts. If all can be paid, it is well. If not, they must be paid pro rata; or at all events, this court cannot establish a preference, the only foundation for which would be an unauthorized and fraudulent act of a partner after dissolution.

I have examined the pleadings carefully, to ascertain how far the court would be authorized to make any order to give any direction in relation to the payment of the notes, and it appears to me that that matter is not within the case. The bill prays relief against the mortgage; and although it prays that the notes may be given up to be cancelled, yet that seems to be on the ground that they are merely colorable, and therefore no foundation for the mortgage, and that to effect the complainant's object, (the avoidance of the mortgage,) it might be necessary to go into the consideration of the notes.

The decree of the court is, that the mortgage be delivered up to be cancelled, and that the defendant be perpetually restrained from all further proceedings on the execution.

Not being satisfied that there is any fraud in this case on the part of Mrs. Johnson, I shall not order costs as against her.

CITED *in Linford* v. *Linford*, 4 *Dutcher* 116; *Long* v. *Simpson*, 3 *Stockt.* 250; *Deveney* v. *Mahoney*, 8 *C. E. Gr.* 249.

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JOHN CRAWFORD AND RICHARD S. HARTSHORNE v. JOHN G. BERTHOLF, JOSEPH PARKER, WILLIAM PARKER AND JOSEPH H. VAN MATER.

The practice of examining witnesses a second time, on the same matter, disapproved.

The execution and acknowledgment of a deed of conveyance, is not sufficient; it must be delivered to the purchaser, actually or in contemplation of law, to pass the title.

It is not necessary that there should be an actual handing over of the instrument, to constitute a delivery; a deed may be delivered by words without acts, by acts without words, or by both words and acts.

A deed may be effectual to pass real estate, though it be left in the custody of the grantor. If both parties be present, and the contract is to all appearance consummated, without any condition or qualification annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor.

It is necessary, however, that there should be some act evincing the intent; it must satisfactorily appear, if not from acts or express words, yet from circumstances at least, that there was intention to part with the deed, and of course to pass the title.

Where the evidence opposes the idea that there was a delivery, and proves, that although there might have been an intention to deliver, founded on the presumption that the contract was about to be consummated; yet that such intention was abandoned, and it was distinctly stated that the deed could not or would not be delivered at that time; it cannot be considered a delivery.

William Parker, the elder, by his will devised a farm to his son Joseph Parker; and directed, that if the property appropriated for that purpose should not be enough to pay his debts, his sons, Joseph Parker and William Parker, should pay the remainder. Joseph Parker, being in possession of the place devised to him, offered it for sale at public auction, and agreed to take in payment any lawful claims against the estate of his father. William L. Lloyd became the purchaser. He then proposed to borrow of John Crawford a sealed bill given him by the testator for one thousand eight hundred

dollars, on which about two thousand dollars was due; and pay it to Joseph Parker in part of the purchase; and in lieu of it, to give J. Crawford a mortgage on the property; to which all parties agreed; and W. Lloyd was let into possession. The parties afterwards met to complete the purchase; when it was proposed by Lloyd, and agreed to by Parker, that beside the said sealed bill to Crawford, Parker should take two bonds given to Thomas Lloyd, and a sealed bill given to the executors of Thomas Lloyd, in part payment, and for the balance of the purchase money take the note of W. Lloyd, with J. H. Van Mater as security; and that on receiving these the deed should be delivered. Parker executed and acknowledged a deed to Lloyd for the premises, and it was laid on the table. Lloyd executed and delivered a bond and mortgage to Crawford for two thousand dollars, which was afterwards recorded. Crawford delivered his sealed bill to Lloyd, who gave it to Parker in part payment, together with the two bonds to T. Lloyd and sealed bill to the executors of T. Lloyd, as claims against the testator's estate. The interest was cast on them, they were taken into possession by Parker; he tore the seals from two of the instruments, and Lloyd tore the seal from a third; the seals were torn from the sealed bill of Crawford's and two of the bonds. Lloyd then signed the note to Parker for the balance of the purchase money, which was to be signed by J. H. Van Mater at a future day. Lloyd then said, this (the deed) I suppose belongs to me, and the scrivener was about to hand it to him; but Parker said, no, you cannot have it until the conditions are fully complied with. It was then agreed that the deed should be delivered the next second-day, when the note and security was to be given. Lloyd went away and left the deed, which was handed back to Parker. Under these circumstances, the deed cannot be considered as delivered.

Before the business at this meeting was closed, Parker began to suspect that some of the bonds he had received were not genuine; and after Lloyd went away, mentioned his suspicions to Dr Ten Broeck, who was present. Some days afterwards Lloyd called on Parker; said he had Van Mater's security to the note, and wanted the deed. Parker, then being satisfied that two of the bonds he had received were not genuine, said he would not accept the note till the bonds were made good; and refused to deliver the deed. He offered to return the bills and bonds he had received to Lloyd, who refused to take them. Parker then brought an ejectment for the land, and Lloyd filed a bill for specific performance of the contract, and obtained an injunction to stay proceedings in the ejectment. An issue was awarded to try the genuineness of the bonds, two of which were found to be spurious: whereupon the injunction was dissolved and the bill dismissed, and Parker recovered possession of the land. After the termination of this suit, the estate of William Parker, the testator, proving to be insolvent; his executors, under an order of the orphan's court of the county of Monmouth, sold and conveyed the farm to J. G. Bertholf, for three thousand two hundred and seventy-five dollars and eighty-six cents; after which the interest of W. Lloyd in the premises was sold, under an execution against him, by the sheriff, to J. H. Van Mater, for fourteen dollars and twenty-seven cents. J. Crawford assigned his bond and mortgage to Richard S. Hartshorne, (the sealed bill being still unpaid,) upon which the complainants, Crawford and Hartshorne,

filed the present bill; praying that the mortgage may be decreed to be a lien on the premises, or that the complainants may be decreed to have an equitable lien on the property, for the amount of the sealed bill or mortgage; and that an account be taken, and the executors of W. Parker decreed to pay it. Held that the complainants have shown no sufficient ground of equity to entitle them to relief.

When the contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser, of the estate sold; and the purchaser as trustee of the purchase money, for the vendor.

As a consequence of this rule, the purchaser may sell or charge the estate, before the conveyance is executed. He may come into this court, claiming a specific performance of the contract, and compel the execution of the title.

If he has paid any part of the purchase money, he will be considered as having a lien on the property for the amount thus paid; and a court of equity will not compel him to render up possession, until he shall have been repaid.

But all this proceeds on the principle of honesty and good faith between the parties; without this, equity will not interfere. If there be fraud in the transaction, equity will not yield its aid to the wrong doer; but will leave him to his legal remedy.

It is a sound maxim, that "he who commits inequity shall not have equity."—In this case this maxim will apply. W. L. Lloyd had no equity. He had paid part of the purchase money in available securities; the other securities offered were not genuine. He attempted fraudulently to impose on the vendor, and was considered as entitled to no equitable relief. He could not obtain a decree for specific performance; but on the ground of fraud, his bill was dismissed.

Under these circumstances, Lloyd, personally, had had no lien upon the property for the money he had paid. He was entitled to a return of the money (or securities) paid, or to recover it back of the vendor, but nothing more.

Such being the case, Lloyd had no equitable right that he could convey to Crawford; and Crawford, considered simply as a purchaser under Lloyd, can have no rights as against the defendants.

This is not the case of notice. When one affected with notice conveys to one without notice, the assignee, in case he has the legal estate, shall be protected. Here the assignee has not the legal estate. His assignor was not affected with notice of any incumbrance or claim, but was guilty of fraud; and the assignee is seeking protection, not against the incumbrancer, but against the owner of the legal estate.

It is a general rule in equity, that when a person having rights, and knowing those rights, sees another person take a mortgage upon property, without disclosing his title, he shall not be allowed afterwards to set up his title to defeat the mortgage. The same principle applies to other transactions.

The cases under this head of equity, all go on the ground of misrepresentation or fraudulent concealment, whereby an innocent person is induced to do what he otherwise would not do.

In this case, there was no misrepresentation on the part of Parker. As to concealment, his not communicating to Crawford, at the time, his suspicions of

the genuineness of the bonds, when they were mere suspicions, and he had no personal knowledge of the fact; does not render him liable to the imputation of fraud.

A party, to be charged on the ground of concealment, should be aware of his rights. Fraud implies knowledge: if there was a mistake, this court will not consider it fraud.

Nor was Parker guilty of fraud in not returning the sealed bill to Crawford: he did not deal with him. The bill came not from Crawford, but from Lloyd to Parker. It belonged to Lloyd: he had purchased it. When he failed to comply, he was entitled to receive back what he had paid: it was offered to him, and he refused it.

If Crawford had taken any pains, he might have recovered the possession of his bill, and been in as good a situation as when he passed it to Lloyd. The mutilation of the bill, by tearing off the seals, could not have affected the validity of the bill, or impaired his rights.

That the estate to which he must look for payment, has since become wasted, in consequence of which the complainants may suffer loss, does not alter the principle; nor can it, in this case, furnish a substantive ground of relief.

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William Parker, late of Monmouth, by his last will and testament, dated May 28, 1812, ordered his executors to pay all his debts and legacies out of his movable estate, and the lands which he should in his said will order to be sold. He gave to his son, Joseph Parker, a property known by the name of the Potter place; and directed, that if there should not be enough to pay the debts in the property appropriated for that purpose, his two sons, Joseph and William, should pay the remainder. The testator died in 1815, and the will was proved by both executors. In 1816, Joseph Parker being in possession of the Potter place, so devised to him, advertised it for sale at public auction. At the sale it was struck off to William L. Lloyd, he being the highest bidder.

The bill then charges, that the testator in his life time was indebted to John Crawford, one of the complainants, in and by a certain single bill, dated 1st April, 1812, in the sum of two thousand dollars or upwards. This bill Lloyd proposed to borrow of Crawford and pay to Parker, in part payment of the land, and give to Crawford, in lieu of it, a bond and mortgage on the property so purchased. The arrangement was agreed to by all parties, and they met on the 17th December, 1817, to complete the purchase and sale. It was then agreed that Parker should take, in part payment of the purchase money, the single bill aforementioned; also two bonds purporting to have been given by

William Parker to one Thomas Lloyd, deceased, and one bill given by said William Parker to the executors of Thomas Lloyd; and that for the balance, Joseph Parker should take the note of William L. Lloyd, the purchaser, with Joseph H. Van Mater as his surety; and that on receiving the said securities, a deed should be delivered to the purchaser.

The bill further charges, that the purchaser, William L. Lloyd, was let into possession on the 1st of April, 1817, and continued in on the 17th December, 1817, when the parties met to complete the purchase. That at this meeting John Crawford attended, for the purpose of delivering over the said single bill, and receiving his bond and mortgage from William L. Lloyd. That Joseph Parker was there, attended by Dr. Samuel W. Ten Broeck, the agent of the executors of William Parker, deceased; and then produced a deed from himself and wife to the said William L. Lloyd for the property, bearing date the 1st of April, 1817, duly executed and acknowledged. That at the same time Dr. Saml. W. Ten Broeck, the aforesaid agent, produced a deed of mortgage prepared by himself, from the said William L. Lloyd to the said John Crawford, dated December 16, 1817. That at this meeting the notes, bills and obligations agreed by Joseph Parker to be received in part payment were produced, and the amount of them deducted from the purchase money; and a note was thereupon drawn for the balance, to be signed by the said William L. Lloyd at that time, and by Joseph H. Van Mater at a future day. That thereupon the said notes, bills or obligations were delivered up to the said Joseph Parker, or his agent, and the seals of two of them torn off by the said Joseph Parker, and of another one by the said William L. Lloyd. That William L. Lloyd then signed the note for the balance, and Joseph Parker delivered to him the deed, which he accepted and took into his possession; and having it in his possession, he, in the presence of Parker, executed to John Crawford a bond and mortgage for the amount of the note or single bill delivered to him by Crawford, and which he had delivered to Joseph Parker. That this mortgage was afterwards registered, on the 28th January, 1818, in the clerk's office in Freehold, in the county of Monmouth. The bill then charges that Joseph Parker, and Ten Broeck, the

agent, were both present when Crawford loaned and delivered the single bill to Lloyd, and saw and knew that Crawford accepted in lieu thereof the bond and mortgage from Lloyd, without making any claim or giving any warning whatever. That the said single bill was accepted by the said Joseph Parker as one of the debts to be paid out of the Potter place, and was a lien on it, and has always since been retained by said Parker, and has been cancelled or otherwise held as a voucher and never returned or delivered either to Lloyd or Crawford. That afterwards, either because the note for the balance aforesaid was not executed, or because some suspicion arose as to the genuineness of some of the obligations that had been delivered by Lloyd to Parker, the deed came again into the possession of Joseph Parker, who afterwards refused to deliver the same, but brought an action of ejectment for the said premises. That upon this, Lloyd filed a bill in this court for the purpose of obtaining the deed and for a specific performance of the contract, and also for an injunction; which bill was afterwards dismissed with costs. The bill further charges, that during the pendency of this suit, the executors and their agent frequently promised the complainant, Crawford, that if he would not interfere in the suit by becoming a party thereto, or instituting proceedings on his mortgage, that it should be considered a lien on the premises, and fully satisfied. That after the termination of the suit, and under pretence of some rule or order of the orphans' court of the county of Monmouth, the executors sold the mortgaged premises to John G. Bertholf for three thousand two hundred and seventy-five dollars and eighty-six cents, and made him a deed therefor, which has since been duly recorded. That at the sale Crawford caused notice to be given of his mortgage; and it is expressly charged, that Bertholf had full notice, both in fact and in law, before the purchase.

The bill further charges that the same premises, or the interest of William L. Lloyd therein, was subsequently sold by the sheriff, under an execution against Lloyd, and purchased by Joseph H. Van Mater, for fourteen dollars and thirty-seven cents, and that the sheriff made a deed to him accordingly; and that on the 13th September, 1825, Crawford assigned the bond and mortgage to

Richard S. Hartshorne; that the bill is still unpaid, and the estate of William Parker insolvent.

Under these circumstances, the complainants pray that the mortgage may be decreed to be a lien on the premises; or that the complainants, if more equitable, may be decreed to have an equitable lien on the property for the amount of the note or the mortgage; and that an account be taken, and the said executors be decreed to pay it, and in default thereof that the property be sold, &c.

The answer of Joseph Parker admits the will and the sale, as set out in the bill; and says that in April, 1817, he was ready to deliver a deed to the purchaser, Lloyd, and so informed him, and showed him the deed, and requested him to make the first payment; but he was not prepared to do it. That on the 16th December, 1817, William L. Lloyd called on him, and proposed to deliver to him, in part payment of the purchase money, the notes, bills and bonds before mentioned; and proposed further to give to him, for the balance, his own note with Joseph H. Van Mater as his security. That the defendant, presuming the instruments thus offered to be genuine, was disposed to accept of the offer, and tore off the seals from two of the said bonds; but before the business was completed he began to suspect the genuineness of two of the bonds, though he believed the sealed bill given to Crawford to be genuine. From delicacy to the feelings of Lloyd he did not communicate his suspicions at that time, but when Lloyd left the room he mentioned his suspicions to Dr. Ten Broeck. That he kept the bonds for several days for the purpose of having them examined, and being confirmed in his suspicions he tendered them, and also the bill of Crawford, to Lloyd, who refused to receive them. He denies that he ever delivered the deed to Lloyd; but alleges that the arrangement was never completed, and that Lloyd was never entitled to a delivery of the deed; that he never gave his bond, with Van Mater his surety, for the balance. He admits that Lloyd was let into possession in the spring of 1817, under the impression that he would honestly comply with the terms of the purchase; and that he was willing to take in payment any genuine claims that Lloyd could produce against the estate of William Parker, deceased; but considering that it

was attempted to practice a fraud upon him, he felt justified in refusing to deliver the deed. He denies that he accepted the sealed bills or delivered the deed, and alleges that before such acceptance and delivery, suspicions arose as to the genuineness of some of them, which led to an adjournment; and he denies cancelling the sealed bill of the complainant. He admits that after tendering the bills, he brought an ejectment to recover possession of the premises; and that a bill was thereupon filed in this court by William L. Lloyd, as above stated: that after answer put in, a feigned issue was awarded to ascertain the genuineness of the two suspected bills; and that on the trial of the issue they were found to be spurious; upon which the bill was dismissed, and the possession of the property decreed to the defendant. He admits, further, that the debt of Crawford against the estate is a just debt, and that they had always been willing to allow it in a course of administration. He denies that he or his co-executor ever promised Crawford, that if he would not interfere in the suit with Lloyd, that his mortgage should be paid, or considered a lien on the property. He admits the estate of his testator to be insolvent.

The defendant Bertholf, the last purchaser, admits the purchase, and denies that Crawford, or any person in his behalf, gave him notice of his mortgage at the sale, or at any time before the payment of the purchase money; and that he purchased and paid the money without any kind of notice of such claim.

They admit the judgment and sale to Joseph H. Van Mater; and also that the charge of the assignment of the bond and mortgage to Hartshorne may be true; but insist that if true, it was not bona fide, but made to give to the claim the appearance of being brought forward by an innocent assignee.

Testimony was taken on both sides: it is noticed in detail, as it applies to the several points considered, in the opinion of the court. The case was argued by

*G. D. Wall*, for complainants;

*G. Wood*, for defendants.

Cases cited:—1 *W. Blac. R.* 150; 3 *Pow. M.* 1062; 1 *Mad.* 209; 2 *Pow. M.* 427; 5 *John. C.* 272; *Rev. L.* 435; 7 *Pick. R.* 91; 18 *Ves.* 515; 18 *John.* 544; 2 *Ball and B.* 75, 303; 1 *Scho. and L.* 90, 103; 1 *John. C.* 566, 574; 6 *Halst. R.* 610; case of *B. Hopkins*, in this court.

THE CHANCELLOR. The first ground taken by the complainants, is, that the mortgage given by Lloyd to Crawford, and by Crawford assigned to Hartshorne, is a legal and subsisting mortgage; and therefore that Hartshorne is entitled to relief, simply as a mortgagee.

Whether the mortgage be a legal mortgage or not must depend, in a great measure, on the correct solution of the question, whether the deed was delivered in contemplation of law? If the deed was actually delivered to the purchaser, the title passed with it, and the mortgage would be good, unless taken out of the general rule by some special circumstances. The delivery of the deed is expressly alleged in the bill, and as expressly denied in the answer; and the answer must be taken as true, unless overcome by the evidence. Several witnesses have been examined to this point on the part of the complainant, but they have altogether failed to establish it. Joseph Parker, jun. says there was no delivery of the deed; that it was agreed between the parties that the deed was to be delivered on the next second-day, when the note and security was to be given; that the deed laid on the table, and W. L. Lloyd said, I suppose this belongs to me: Dr. Ten Broeck and Joseph Parker said *no*, you cannot have it till the conditions are fully complied with; and the deed was accordingly left and Lloyd went away. Jacob Croxson, another witness called by complainant, was present and took the acknowledgment on the deed and mortgage. He was then going to hand the deed to William L. Lloyd, but Parker and Ten Broeck objected to it, till the conditions were complied with, and witness gave the deed to Joseph Parker. Lloyd never laid his finger on it after the acknowledgment was taken. The testimony of Logan Bennett, another witness of the complainant, would lead to a somewhat different conclusion. He was present at an interview between Lloyd and Parker. Lloyd told Parker he had come to

comply; he had Joseph H. Van Mater security, and wanted the deed that was left with Mr. Croxson. Mr. Parker said he would not accept of Mr. Van Mater as security, till he had first made the bonds good. Lloyd asked him if he had not made, signed, sealed and delivered a deed, and left it with Mr. Croxson, till he should bring Mr. Van Mater as security; and he said he had. This is the only evidence of a delivery of the deed to Mr. Croxson, or any other person; and seeing that it is directly opposed to the testimony of the witnesses who were present when the transaction took place, and especially to that of Jacob Croxson himself, who must have known the fact if it actually occurred, I am induced to believe that the witness is under some mistake. The same witnesses were also examined at a different time, on the part of the defendants, to the same points. Why this was done I do not precisely understand; but I would take this opportunity of saying, that the practice which sometimes obtains, of examining witnesses a second time on the same matters, is one which does not receive the countenance of the court. The facts stated by the witnesses, so far as they touch the point under consideration, are substantially the same in both examinations. Such being the evidence, I cannot consider that the deed in this case was delivered.

It is not necessary that there should be an actual handing over of the instrument to constitute a delivery. A deed may be delivered by words without acts, or by acts without words, or by both acts and words: *Shep. Touch.* 58. A deed may be effectual to pass real estate, though it be left in the custody of the grantor. Thus, if both parties be present, and the contract is to all appearance consummated, without any conditions or qualifications annexed, it is still a complete and valid deed, notwithstanding it be left in the custody of the grantor: *Souvebye* v. *Arden*, 1 *John. C. R.* 240; *Jones* v. *Jones*, 6 *Conn. Rep.* 111; *Doe* v. *Knight*, 5 *Barn. and Cress.* 671; 4 *Kent's Com.* 448. It is necessary, however, that there should be something evincing the intent. It must satisfactorily appear, if not from acts and express words, yet from circumstances at least, that there was an intention to part with the deed, and of course to pass the title. See

the case of *Folly* v. *Van Tuyl*, 4 *Hals. Rep.* 153, and the authorities there cited.

In the case before me, the evidence very plainly opposes the idea that there was any delivery of the deed; and it proves that, although there might have been an intention to deliver it, founded on a presumption that the contract was about to be consummated at that time, yet that such intention was openly abandoned, and it was distinctly stated that the deed could not and would not be delivered at that time. It cannot be considered a delivery. There does not appear to be any room for inference or doubt; and without taking up further time on this part of the case, I am satisfied to say that the complainant has no standing in this court on the ground of his having a legal mortgage.

And this brings to me the second inquiry, which is, whether the complainant may not be considered, in this court, in the light of an equitable mortgagee; having, by reason of his situation, peculiar rights and interests, which a court of equity is bound to protect.

On this part of the subject, a correct understanding of the facts is essentially necessary to lead to a true result.

It appears that by the terms of the sale, Joseph Parker was bound to take in payment any claims that might lawfully be presented against the estate of his father. When Lloyd became the purchaser, he had in his hands some bonds purporting to be charges against the estate, but not enough to meet the purchase money. At this time, John Crawford held a single bill against the estate for a little upwards of two thousand dollars, payable to bearer. This bill Crawford agreed to let Lloyd have, to make up his payment, and Lloyd agreed to give Crawford a first mortgage upon the farm. Crawford attended at the time the deed was to be made. He produced the bill, and handed it to Lloyd, who gave it to Parker in part payment, together with the other bills or bonds that he had against the estate. The interest was cast upon them. They were taken into possession by Parker. He tore the seal from two of the instruments, and Lloyd tore the seal from a third one. The seal was torn from Crawford's note. The deed was produced and acknowledged, ready for delivery; and it was agreed that the deed should be delivered at some future

day, either when a note with security should be given for the balance of the purchase money, or when the conditions should be fully complied with; but it was distinctly understood that the deed was not delivered, and was not to be delivered at that time. During all this time Crawford was present. He saw the notes or bills received and paid. He saw the seals torn from some of them, and the deed executed and acknowledged. The mortgage was produced which was to be given by Lloyd to him: it was acknowledged there at the same time the deed was acknowledged, and was passed over to him by Lloyd, as a security for the bond he had taken in lieu of the single bill, and it was afterwards recorded.

It turned out, however, that the contract was never carried into effect. Suspicions arose as to the genuineness of two of the bills passed by Lloyd to Parker, and Parker refused to deliver the deed, but offered to return to Lloyd the notes and bills or bonds received from him. Lloyd peremptorily refused to receive them. Both parties resorted to their legal remedies. Parker brought an ejectment to recover the possession. Lloyd filed a bill for a specific performance, and injoined Parker from proceeding in his action. A feigned issue was awarded out of this court to try the genuineness of the two suspected bills, and they were found to be spurious; and the result was, that Lloyd's bill was dismissed, and Parker recovered possession of the land.

Such I take to be the material facts relating to this part of the transaction; and with these facts before me, I proceed to consider in the first place, the equity of Crawford, as derived immediately from Lloyd the purchaser, through the medium of the mortgage. This, of course, will depend on the equity of Lloyd the purchaser, as against Parker the vendor. It is a rule in equity, that when a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor. As a consequence of this, it is admitted that a purchaser may sell or charge the estate before the conveyance is executed: he may come into this court claiming a specific performance, and compel the execution of a title. If he has paid any part of the purchase money, he will be considered as having a lien on the

property for the amount thus paid, and a court of equity will not compel him to surrender possession until he shall have been fully satisfied. But all this proceeds upon the principle of honesty and good faith between the parties: without this, equity will not interfere. If there be fraud in the transaction, equity will not yield its aid to the wrong-doer, but leave him to his legal remedy. Where, then, is the equity of Lloyd? He paid a part of the purchase money, it is true, in available securities; but for other part offered notes or bonds that were not genuine. He attempted, as has already been decided in this court, fraudulently to impose upon the vendor, and he was considered as being entitled to no equitable relief. He could not obtain a decree for a specific performance of the contract, but on the ground of the fraud his bill was dismissed out of this court with costs. Under these circumstances, I think that Lloyd personally had no lien on the property for the purchase money he had paid: he was entitled to a return of the money, or to recover it back of the vendor, but nothing more. It is a sound maxim, that *he who commits inequity shall not have equity: Francis Max.* 2; and in this case the maxim will well apply to Lloyd. Such being the case, he had no equitable rights that he could convey to Crawford; and Crawford, when considered simply in the light of a purchaser under Lloyd, can have no rights as against the defendant. This is not the ordinary case of notice, in which it seems to be settled, that if one affected with notice, conveys to another without notice, the assignee, in case he has the legal estate, shall be protected. Here the assignee has not the legal estate; his assignor was not affected with notice of any incumbrance or claim, but was guilty of fraud; and he is seeking protection, not from an incumbrance, but from the owner of the legal estate.

If Crawford is entitled to relief in this case, it is on the ground of fraud, actual or constructive, on the part of Parker. And under this head it is charged against him, that he knew Crawford had loaned the note to Lloyd to make up the amount of the purchase money, and that he was to be secured by a first mortgage on the property; that Parker was present when the note was passed over, and received it from Lloyd, and took it as so much money; that he saw Crawford take the bond and mort-

gage as his security, on the express agreement that when the note with security should be given for the balance, the deed should be delivered, and yet gave him no notice of the supposed fraud or forgery; but afterwards refused to comply with his agreement, and kept the note without delivering it up to the owner; and also that he promised, if Crawford would not interfere in the suit with Lloyd, or press his mortgage, he should be fully paid, and his mortgage should be considered a lien on the premises. As to this last part, it is fully denied in the answer, and there is no evidence whatever to support the allegation of the bill. Nor is there any evidence to show that Parker, in any part of the transaction, dealt with Crawford. He made no arrangement with him for his note, or concerning the mortgage. There was no privity or contract between them, so far as I have been able to discover. But it is evident that Parker knew of the loan by Crawford to Lloyd, and that Crawford was to be secured by a mortgage on the land; and it is equally true that he saw Crawford take the mortgage, without giving any notice of his suspicions, or in any way putting him on his guard.

It is a general rule in equity, that where a person having rights, and knowing those rights, sees another person take a mortgage upon property without disclosing his title, he shall not be allowed afterwards to set up his title to defeat the mortgage. Thus, if a first mortgagee stand by and suffer a second mortgagee to advance his money, on the supposition that he is about to have the legal estate, without disclosing his own prior incumbrance, it is an acquiescence in the transaction, and the sufferance of a fraudulent treaty to go on, for which he will lose his priority: 2 *Pow.* 437. So, in like manner, if a mortgagee permit a person who has purchased the equity of redemption without notice, to continue building on the estate without giving him notice of the incumbrance, it was held by Ld. Hardwicke to be a reason why a court of equity would not assist him in setting up the incumbrance: *Steed* v. *Whitaker*, *Barn. C. C.* 220. The case of *Haring* v. *Fernes*, *Gilb. Eq. Ca.* 85, is a strong case, in which a fraudulent concealment was relieved against. A father, tenant for life, made a lease to plaintiff for thirty years; who, supposing his lessor to have full power to demise for that

period, laid out considerable sums of money in repairs. The defendant was the eldest son of the lessor, and next tenant in tail to the estate. The son knew his father had no power to make the lease, and told him so, while the improvements were going on, but never acquainted the tenant with the fact; on the contrary, he wrote to him to keep the premises in repair. On the death of the father, the son brought ejectment and recovered: whereupon the tenant brought his bill to be quieted in his possession for the residue of the lease; and the court decreed in his favor, on the ground of a fraudulent concealment. There are a great variety of cases under this head of equity, to which it is not considered necessary to advert particularly. They go on the ground of misrepresentation or fraudulent concealment, whereby an innocent person is induced to do what he otherwise would not do.

In the case before me, I do not find any misrepresentation on the part of Parker; for the fraud must be brought home to him. It is not sufficient that fraud was practiced by Lloyd; there is no pretence that Parker participated in that. Then as to the concealment; Crawford was present during the whole time. He knew there was no delivery of the deed, no actual transfer of the title, but that the matter was to be consummated at some future day. The time when and the mode in which this consummation was to take place, was also known, and doubtless it was the expectation of all that the title would be perfected. But for the fraud of Lloyd it would have taken place. I can see no ground to charge Parker, except that he did not apprize Crawford of his suspicions that the bonds were forged. But these were mere suspicions, he had no knowledge of the fact; and I think it would be carrying the doctrine too far to say, that because he did not at that time, and under the circumstances of delicacy in which he was placed, communicate his suspicions to Crawford, therefore he is to be considered as liable to the imputation of fraud. A party, to be charged on the ground of concealment, should be aware of his rights. Fraud implies knowledge. If there was a mistake, this court will not consider it fraud. In the case of *Cholmondely* v. *Clinton and al.*, 2 *Mer.* 361, Ld. Eldon says: "If, indeed, Ld. Orford had been aware of his title, and had stood

by and seen persons advancing money on the estate, on the faith of its belonging to Ld. Clinton, some question might be made on the ground of acquiescence. But Ld. Orford could not be said to acquiesce in acts which he did not know he had any right to dispute; and therefore, all that has been said about acquiescence seems to be irrelevant in a case where all parties were under the influence of a common mistake."

It is said, however, that Parker was guilty of a fraud in not delivering the bill back to Crawford; but I cannot concur in that view of the case. As before remarked, Parker did not deal with Crawford. When Lloyd failed to comply, he was entitled to receive back what he had paid; and it was offered him, and he refused to take it. This single bill came from Lloyd to Parker, and not from Crawford. It belonged to Lloyd, for he had purchased it, and it would have been singular if Parker had offered it to Crawford and not to Lloyd, from whom he got it. It is to be remembered, too, that Crawford knew the contract was not completed; that the deed was not made and would not be made. If he had taken the least trouble or pains, he might have recovered the possession of his bill, and would have been in as good a situation as before he passed it to Lloyd. The mutilation of the note, by tearing off the seal, could not have affected its validity or impaired his rights; and the probability is he would have received his money. That the estate and property to which he must look for payment, has since become wasted, in consequence of which the complainant may suffer loss, does not alter principles; nor can it, in this case, furnish a substantive ground for relief.

The result of this view of the case is, that the complainants have shown no sufficient ground of equity to entitle them to relief. Without, therefore, giving any opinion as to the defence of Bertholf, who claims to be a bona fide purchaser from Parker, without notice and for a valuable consideration, I shall order the bill to be dismissed, with costs.

CITED *in Force* v. *Dutcher*, 2 *C. E. Gr.* 168; *Woodward* v. *Woodward*, 4 *Hal. Ch.* 784; *Haughwout* v. *Murphy*, 7 *C. E. Gr.* 546; *Cannon* v. *Cannon*, 11 *C. E. Gr.* 320.

ACHSAH CLUTCH v. JAMES CLUTCH.

In divorce cases the court takes the confessions of parties with very great caution, and they are never held sufficient without strong corroborative circumstances.

A voluntary affidavit taken before a magistrate is inadmissible as evidence.

A charge in the petition, that the defendant since his marriage hath committed adultery, without setting forth time, place, or circumstances, is too general.

Upon evidence of extreme cruelty, though not a case of the most aggravated character, a separation decreed for the term of three years; and the child, being of tender years, committed to the custody of the mother.

*Query.* Whether a charge for adultery, and a charge for extreme cruelty, ought to be joined in the petition.

This was on petition for a divorce *a vinculo matrimonii*, on the ground of adultery, and for a divorce from bed and board, on the ground of extreme cruelty.

*H. W. Green*, for petitioner.

THE CHANCELLOR. As it regards the charge of adultery, the case is not satisfactorily made out. One witness states, that while the defendant lived in the house of his father-in-law, Wilkinson, he told witness that he, the defendant, had the venereal disease; that he had contracted it in New-York, and that Dr. Hamilton was attending him. This is the only direct evidence of the fact that has been presented. The evidence, of itself, is insufficient. In cases of this kind, the court takes the confessions of parties with very great caution, and they are never held sufficient without strong corroborating circumstances. In this case there are no such circumstances. The testimony of Phineas S. Bunting is relied on as corroborating the confession of Clutch. He states, that pending an application to the legislature for a divorce between these parties, Dr. Hamilton was examined as a witness before him as a justice of the peace; and that upon the examination, Dr. H. deposed, that Clutch had made application to him for medical advice, and he ascertained that Clutch had the vene-

real disease. Clutch told him he had contracted it in Philadelphia. The affidavit of Dr. Hamilton, as taken before the magistrate, is also produced. This testimony is clearly inadmissible. The affidavit itself is taken without any kind of authority, and is purely voluntary. The whole of it amounts to nothing more than hearsay evidence, and is entitled to no weight in the search after truth.

I would add, also, that the charge of the fact in the petition is too general. It simply states that the defendant hath, since his marriage, committed adultery; without setting forth the time, place, or any of the circumstances. It would be difficult for a defendant to meet so indefinite a charge.

The prayer of the petitioner, so far as it seeks a divorce *a vinculo matrimonii*, is refused.

Upon the other charge, there is testimony to show that the complainant has been treated with very great impropriety on the part of her husband. He is proved to be an intemperate man, and grossly abusive. In one instance he turned his wife and children out of doors, and compelled her to take refuge in her father's house. In another, he is represented as having taken her up forcibly and turned her out of doors, and then shutting the door against her. She has exhibited marks and bruises upon her person, which she represented to be the effect of his violence. He has frequently refused to provide for his family the common necessaries of life, and left them destitute; and several witnesses concur in the opinion, that it would unsafe for her to live with him. Under these circumstance, I feel inclined to grant the application for a separation from bed and board, although the case is certainly not one of the most aggravated character; and in the hope that some reformation may be brought about and the parties become reconciled, I shall decree a separation for the term of three years; and in the mean time the child, who is of tender years, is to be committed to the custody of the mother.

I do not wish to be misunderstood as expressing any opinion on the propriety of joining in one petition a charge for adultery and a charge for extreme cruelty, the legal consequences of which are so totally different. I incline to think it should not be done. But as the defendant has not appeared to contest the suit, or meet

either of the charges; and as this is a case on petition under a late statute, by which the complainant has a right to amend her petition in matters of substance as well as form, and as she comes into court *in forma pauperis*, I have thought proper to pass by the question, if it be one, and place myself upon the merits.

Decree accordingly.

CITED *in Graecen* v. *Graecen*, 1 *Gr. Ch.* 466; *Marsh* v. *Marsh*, 1 *C. E. Gr.* 396; *Close* v. *Close*, 9 *C. E. Gr.* 346.

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ABRAHAM A. QUACKENBUSH v. ABRAHAM VAN RIPER

A defence which might be made at law, and which a party will omit or decline to make, cannot be the basis of a suit in equity; unless it be in case of fraud, accident or trust, peculiarly within the province of a court of equity, or when the jurisdiction of the legal tribunal cannot admit the defence.

When the facts are such as constitute no defence at law, though properly produced; if they are matters of which a court of law can take no cognizance, and such as are peculiarly within the province of a court of equity; there can be no objection to the bill on the ground that it was not filed pending the suit at law, and an injunction cannot be dissolved on that ground.

If a defendant in his answer *charge* certain facts to exist, on which he intends to rely for his defence, and swears to the answer in the ordinary form, he swears to the *truth* of the facts, and not to the *fact* of the charge; and if the facts as charged are not true, perjury may be assigned upon it.

It is not sufficient for the defendant in his answer to say he does not know it, or does not believe it; as that may all be true, and yet the fact charged be uncontradicted.

What is necessary, and sufficient, in an answer.

When a charge is not fully answered, yet if the complainant do not show himself entitled to claim the equity growing out of that transaction, it will not stand in the way of dissolving an injunction.

When the answer is sufficient, and the complainant's equity denied, the injunction will be dissolved.

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The injunction in this case was allowed on the following state of facts, as set forth in the bill.

On the 25th March, 1825, the complainant purchased of the executors of Garret Lydecker, deceased, a farm in Bergen, containing eighty-seven acres and eighty-four hundredths of an acre, for the sum of three thousand seven hundred and fifty dol-

lars, and received a conveyance therefor. Running through these premises is a natural stream of water, across which there was at the time, and had been for ten or eleven years previous, a dam, for the use of a turning-mill. After the purchase complainant built a dam and cotton manufactory. In the life-time of Lydecker, from whose executors the complainant purchased, one Abraham Forshee owned the lands now in possession of defendant, and adjoining the lands of the complainant. The stream of water before spoken of runs first through the lands of the defendant, and then through the lands of the complainant. About the year 1812, when the premises now owned by the complainant and defendant were owned by Forshee and Lydecker severally, they agreed to sell to one Jesse Chapel a mill site on this stream for a turning-mill. The dam was to be near the division line where it crossed the brook. Each was to make a deed to Chapel for one hundred feet square of land, with the right of flowing back the water, for which each was to receive the sum of five pounds. Chapel paid the consideration money and took possession, and had the deeds prepared at his own expense; but they were not executed on account of some dispute between Lydecker and Forshee about the line of division, and it was deferred to a future day. Chapel remained in possession, erected a dam, and flowed back the water up to what is called the Great Falls, or nearly so, and erected a turning-mill, and occupied it for several years. After this Lydecker came into the possession of it, and claimed to hold it under Chapel, and after Lydecker's death it was held by his children or some of them. The complainant purchased of the executors of Lydecker, having understood from Forshee that he had sold to Chapel and received his money, as aforesaid, and that Chapel had the privilege of flowing back the water as far as his interest might require; and he purchased under the belief that by such purchase he acquired all Chapel's right.

On the first day of May, 1818, and before the complainant purchased, Forshee sold to the defendant the property adjoining. The conveyance, though absolute on the face of it, was nevertheless only in the nature of a mortgage. The complainant knew of this conveyance before he purchased of Lydecker's ex-

ecutors; but he understood from Forshee that the part sold to Chapel had been excepted: and supposing that to be the case, and knowing that the defendant was apprised of all the circumstances, he went on to erect a dam and cotton mill; and it was not until he had progressed in the work, that he discovered, on searching the records, that there was no such reservation in the deed.

The bill then charges that the defendant, before he obtained his title from Forshee, had notice that Forshee had sold to Chapel, and that Forshee, when he agreed to make the conveyance, told him that the rights and privileges of Chapel ought to be excepted in the deed: that Forshee was an unlettered man, and never in truth intended to convey them to the defendant: and further, that after he obtained his deed, he the defendant, told the complainant that Forshee informed him of the sale to Chapel: that Chapel, or some person under him, was in possession when the defendant purchased in 1818, and continued so without any claim or pretence of right on the part of the defendant.

After the complainant had made some progress in the erection of his dam, he was apprised by the defendant that he the defendant intended to dispute the right of flowing back water on his land; whereupon the complainant, ascertaining that there was no reservation in the deed from Forshee to the defendant, thought it advisable to negociate, and had several friendly conversations with the defendant, and under the assurance that the difficulties between them should be amicably settled, he progressed in the erection of his dam and mill: that while they were in progress in 1827, the defendant proposed to him that if he would give him counsel and advice in locating and constructing a dam and race for a mill or manufactory that the defendant contemplated erecting on the said stream, that all matters in difference as it regarded flowing back the water should be settled. This was done; he gave the advice and instruction which was beneficial to the defendant, and he acted in accordance with it; and the complainant, supposing all things finally adjusted, went on and completed his dam and mill.

Soon after this, the defendant commenced an action against the complainant in the supreme court, which was tried in the

county of Bergen, and a verdict was obtained against the complainant for one hundred and forty-five dollars damages, on which a judgment has been entered and execution issued, which is now in the hands of the sheriff of Bergen; since which the defendant has again commenced another suit against him in the said supreme court.

The bill then charges, that the defendant is not a tenant in fee of the premises: that the deed under which he holds was intended only as a mortgage and security for money loaned; and that Forshee remained in possession after the deed was given, and the defendant received from him payments on account of interest. That afterwards the defendant pretended that the deed was an absolute one, and that Forshee had no right of redemption; and exacting of Forshee more money by way of rent than the interest of the money, Forshee abandoned the premises. That the complainant has since purchased of Forshee and wife their equity of redemption.

Under these circumstances the complainant insisted, that the defendant, being but a mortgagee, should come to an account, and on receiving the balance due convey the premises to him; or that he ought to convey the mill seat to him, and carry into effect the agreement with Chapel; and that in the mean time he ought to be restrained from prosecuting any other or farther suit against the complainant.

The injunction restrained the defendant not only from prosecuting the suit then pending, but also from collecting the amount recovered in the first suit.

The answer admits the sale from the executors of Lydecker to the complainant, and that for about ten or eleven years before this purchase there had been a dam across the stream, which had been used for a turning-mill; but denies that the said dam was on the lot of land and premises purchased by the complainant; on the contrary, he says it was on the land the defendant purchased of Forshee. He denies that when the complainant purchased the turning-mill was standing, and insists that the water power intended to be purchased by the complainant was that which was on the lot below the turning-mill dam; and that at the time of the purchase the complainant had no expectation

of availing himself of the water power created by the turning-mill dam, or of flowing the water above the said dam. He admits that about 1812, when Lydecker and Forshee owned the lands now owned by the complainant and defendant, they agreed to sell to Jesse Chapel a site for a dam and turning-mill. The dam was to be on the division line: that deeds were to be made, and five pounds to be paid by Chapel to each: that Chapel took possession and built his mill and dam, but denies that the water was flowed up to the Great Falls, or nearly there. He denies that the said Jesse Chapel was in possession of the dam, or that the turning-mill, as such, was standing when the complainant purchased; and states that he (Chapel) abandoned the premises, and the works of the turning-mill were removed some years before. He denies that Lydecker in his life-time, or any of his children after his death, were in possession of the turning-mill or dam, or that they claimed the right to flow back water on the lands of the defendant. He says that when he, this defendant, purchased of Forshee, Chapel was yet living near the premises, and did not claim any right or interest in the said dam or lots of land. He admits that he gave notice to the complainant not to flow back the water further than the defendant's line, and states that the complainant disclaimed any right to flow back further than the dam, which was agreed to be the line. He admits the conveyance from Forshee to him in 1818, and that it was absolute in form, and denies that there was any understanding or intention whereby it was to have the operation of a mortgage only; but that the sale and conveyance were in truth absolute and unconditional, and were so intended to be. He denies any notice of the right or claim of Chapel, save that he had heard some bargain had been made upon the subject, and enquired of Forshee about it, who told him there had been a verbal bargain on the subject, but that Chapel had not paid the money and no deeds had been executed, and that Chapel had no interest whatever in the premises. He denies that Forshee was an unlettered man, or that he intended to make any reservation. He denies that he ever told the complainant, before he built his dam, that Forshee at the time he conveyed to this defendant, informed him that he (Forshee) had sold or agreed to sell to Chapel such lot

and water privilege as aforesaid, and that he had received his pay for it. He denies that he ever conversed at all with complainant on the subject of Chapel's purchase till long after he commenced his first suit against complainant, since which, in conversing with the complainant, he has always insisted, as he knows the fact to be, that at the time of the said purchase, Jesse Chapel not only had no claim to the said property or any part thereof, but did not pretend to make any claim thereto.

The defendant admits that at the time he purchased of Abraham Forshee, Chapel was in possession of the turning-mill and dam, and flowed the water back for some distance upon the land of this defendant; but he claimed no right or title to the same, and applied to this defendant to purchase it; and not being able to purchase it, he gave up the possession to the defendant and left the state, since which no person has ever used the turning-mill except a man by the name of Waite, who used it for a short time under an agreement with this defendant and the said Lydecker, to pay a certain rent therefor—one half of which was to be retained by the said Lydecker, as the turning-mill was on his side of the line, and the other half was to be retained by this defendant, as he owned the dam and water power.

The defendant admits that when complainant was building his dam, he had frequent conversations with him upon the subject of the dam and water power, and offered to purchase the right to flow back the water upon the lands of this defendant, but that no agreement was made. He denies that he ever made any bargain, as is set forth in the bill, about the location of a dam and mill for this defendant, or about his counsel and advice therefor. He denies also that he employed him to locate his dam or factories. He also denies that he held or holds the property as a mortgagee in possession, and that Forshee had any right of redemption; but admits that he, Forshee, remained in possession for two years, paying rent to an amount not half equal to the legal interest of the purchase money, and then left the possession. And further admits that he would have been willing to take from Forshee or any other person what he gave for the property, but denies that he ever received any money by way of interest either from Forshee or any other person or persons.

On the coming in of the answer, it was moved to dissolve the injunction.

*E. Van Arsdale,* for complainant.

*Th. Frelinghuysen* and *Ph. Dickerson,* for defendant.

Cases cited:—*Eden I.* 79; 1 *Ves. jr.* 426; 1 *John. C. R.* 49, 444, 320, 91, 465; 2 *John. C. R.* 202, 228; 4 *John. C. R.* 510, 497; *Wyatt. C.* 11, 14, 234, 236; *Coop. E.* 313; 11 *Ves. jr.* 303; *Beam. C.* 179.

THE CHANCELLOR. The first ground taken for dissolving the injunction is rather preliminary, having no connection with the main question, and applying to only a part of the case. It relates to the judgment and execution in the first suit; and is, that the application is too late; that the party being conversant of all the facts before the trial, made no defence at law, nor any application for the aid of this court. The proposition as laid down by the defendant's counsel, appears to me to be too broad, and would seem to lead to the conclusion, that in no case will a court of equity interfere after verdict and judgment, where a party was apprised of the facts on which his equity rested, and did not file his bill before judgment rendered. The authorities cited do not go this length. The case of *Lansing* v. *Eddy,* 1 *John. C. R.* 49, was a case of usury, where the defendant, after judgment and execution, sought for a discovery, and to obtain a return of the excess beyond the principal sum loaned and interest. An application for an injunction was refused, because the defence of usury could have been made at law, and no reason was assigned why it was not. In *Simpson* v. *Hart,* 1 *John. C. R.* 98, the injunction was dissolved on the ground that the same matter had been examined by a court having competent power and jurisdiction to pass upon it. The case of *Drage* v. *Strong,* 2 *John. C. R.* 230, was on a motion to dissolve the injunction upon the coming in of the answer. It appeared that the party, having lost the opportunity of a new trial at law by his own default, came into this court to obtain a new trial, and the injunc-

tion was dissolved. In *Williams* v. *Lee*, 3 *Atk.* 223, lord Hardwicke held, that the court would not always relieve against a verdict where the defendant submits to try it at law first, when he might by a bill of discovery have come at the facts by the plaintiff's answer under oath, before any trial at law was had. It is evident that these cases all go on the principle of laches in the party who seeks redress, because he has not brought his facts properly before the court by witnesses, or has not procured through the oath of his adversary, by a bill of discovery, matters that might have availed him on the trial at law; and they go upon the further principle, that if the facts had been made to appear they would have constituted a defence at law. But if the facts are such as constitute no defence at law, though properly produced; if they are matters of which a court of law can take no cognizance, then, I apprehend, there can be no objection to the bill on the ground that it was not filed pending the suit.

The complainant's equity in this case rests on matters of trust, such as are not cognizable in courts of law, and can avail nothing there against a legal title. A simple bill of discovery in such case would have been useless and nugatory, and if all the facts had been plainly proved it could not have varied the result in point of law. In *Bateman* v. *Miller*, 1 *Sch. and Lef.* 201, Ld. Redesdale makes it a part of the rule that prevents this court from interfering with a matter which had been tried in another tribunal, that it *be one over which the court of law had full jurisdiction.*

The true rule is given by Spencer, J., in *Mc Vicker* v. *Wolcott*, 4 *John. R.* 533:—"It is an undeniable proposition that a defence which might be made at law, and which a party will either omit or decline to make, cannot be the basis of a suit in equity, unless it be in cases of fraud, accident or trust peculiarly within the province of a court of equity, or where the jurisdiction of the legal tribunal cannot admit the defence." Inasmuch, then, as the matters which are the foundation of the complainant's suit are such as were peculiarly within the province of a court of equity, the injunction cannot be dissolved on that ground.

It is sought, however, to dissolve the injunction, because the equity of the complainant's bill has been fully answered. The

fulness of the answer is disputed in several particulars; and it is contended, in the first place, that the defendant has not denied the payment of the five pounds by Chapel to Lydecker and Forshee; that by this payment Chapel became the beneficial owner, and the complainant has succeeded to his right, and therefore the charge is material. There certainly is not a full denial of this part of the bill. It is not sufficient for the defendant to say, he does not know it or does not believe it. That may all be true, and yet the fact charged remain uncontradicted. If, therefore, Chapel was setting up this matter against the claim of the defendant, I should have no hesitation in saying that the equity of the bill in this behalf was not answered. But it is set up by a third person, and I do not see that he has any equitable right to avail himself of it. He does not set out in his bill any contract, either legal or equitable, whereby he claims right to succeed to the equities of Chapel. He shows no title or conveyance, no privity either of estate or contract between himself and Chapel, or between Chapel and Lydecker, under whom he claims immediately. On this subject the bill charges, that the said Garret A. Lydecker, for some time previous to his death, was in the possession, use and enjoyment of the said turning-mill and dam, so erected by the said Jesse Chapel, and held or claimed to hold the same under the said Jesse Chapel, and so held the same during his life, and after his death the same was held, used and enjoyed by his children or some of them, without any interruption or objection by or from the said Abraham Forshee or the said Abraham Van Riper, till the complainant purchased the said premises.

The allegation that *he held or claimed to hold* under him, is exceedingly vague and unsatisfactory, and seems almost to imply a doubt in the mind of the complainant himself as to his rights. It certainly is not sufficient to entitle him to claim the right that Chapel obtained by his purchases and possession. If there is any thing in it, it must be in the possession which he alleges that Lydecker and his children always enjoyed of this property up to the time they sold it to the complainant. But this charge of possession is distinctly denied in the answer; not only so, but it is expressly asserted that Chapel gave up the possession to the defendant, and that after that no person possessed it except for a

short time, when one Waite used it, paying or agreeing to pay rent to Lydecker and the defendant equally. I think, therefore, that although the charge of the payment of the five pounds is not fully answered, yet, as the complainant has not shown himself entitled to claim the equity growing out of that transaction, it will not stand in the way of dissolving the injunction.

In the second place, it is insisted that the defendant has not fully answered the charge respecting the agreement between himself and the complainant, as set forth in the bill, viz: that if the complainant would give his aid and direction in locating certain factories, he, the defendant, was about erecting, that the defendant would make no further difficulty about flowing back the water, and that all matters should be settled. The defendant, in his answer, denies that he ever made any such bargain as is set forth in the complainant's said bill, respecting the employment of the said complainant to advise in the location of his said cotton mill and dam, and then goes on to state what the facts actually were. The charge is simple, containing one distinct fact. The answer is equally simple, and denies the fact charged. It might have been more precise; it might have stated there was no such agreement as that stated in the bill, nor any other of the like nature and effect. But it is not so indefinite as was supposed on the argument. It was insisted there, that it amounted to nothing more than a denial that he made a bargain to *the like* effect, and did not amount to a denial that he made the bargain charged. I think otherwise; and although, as before stated, the answer might have been more full and technical, I deem it to be sufficient in substance. It is direct, and without evasion. There were no specific charges, requiring a specific answer, and therefore the general answer was sufficient. *Cowp. Plead.* 313.

Again, under this head it is further insisted, that the answer is insufficient, because after denying that there was any such agreement as charged by complainant, it charges what the facts were. The mode is as follows: "On the contrary, he expressly charges the facts to be, that the said stream," &c. It was contended that this was not swearing to the matters charged, but only to the fact of the charge; or in other words, that the party

by that mode of answer, does not swear that the facts are so, but only that he charges them to be so. I do not see it in that light. If a man in his answer charge certain facts or matters to exist, on which he intends to rely for his defence, and swears to the answer in the ordinary form, he swears to the truth of the facts, and not to the fact of the charge; and if the facts as stated or charged are material, and not true, perjury may be assigned upon it.

In the third place, it is insisted, that the charge in the bill, that the defendant is but a mortgagee in possession, and the facts connected therewith, are not fully denied by the answer.

The bill and answer are both very diffuse on this part of the case. The bill first charges that the defendant is not a tenant in fee, but only, in equity, a mortgagee in possession, and that it was fully understood that the deed should be considered as a mortgage. To this the defendant answers, and denies that he is a mortgagee in possession of the said premises, as set forth by the complainant in his said bill. He then undertakes to detail the facts relating to the purchase. In this statement he says, that Forshee proposed to him and Henry A. Hopper to take a deed and pay off the incumbrances, and advance him some money, and to give him some two or three years to refund the same: that this defendant then informed him that he never bought property in that way, and would make no such bargain with him. He states further, that at the time the conveyance was made, there was no right of redemption reserved, but on the contrary that he refused to give any such right. This I consider to be a sufficient denial of the charge. It is then further charged, with more particularity, that Forshee applied to the defendant to assist him, he being then embarrassed, and proposed to give a mortgage to secure him, which the defendant refused to do unless Forshee would assume the payment of certain moneys due him from Forshee's son, John Forshee, on a bond and mortgage, and would let that be put in the mortgage to be given by Forshee to the defendant; and that thereupon Forshee agreed to do so. This, as we have seen, has been already in part answered. As to that part of the charge relating

to John Forshee's bond and mortgage, the defendant answers explicitly, and denies that that debt formed any part of the consideration of the purchase; and he denies that anything was then said, to his knowledge, about the debt of John Forshee.

The bill further charges, that Forshee and wife at first objected to giving an absolute deed, but being threatened with suit by the defendant, he finally, though reluctantly, agreed to execute the deed, but upon the terms and conditions before mentioned. To this the defendant answers, and denies that he ever threatened to prosecute the said Forshee, or used any other means to induce him to sell the farm. It is then charged, that for two years and upwards Forshee continued to use and enjoy the property as his own, and received money from John A. Boyd, esq., or some other person, towards paying the debt and interest due him. To this defendant says, that Forshee occupied the farm, but agreed to pay rent: how much he was to pay the first year he does not recollect: that at the expiration of the first year he made a specific agreement with defendant for another year, and agreed to pay for the whole time two hundred and sixty-two dollars and fifty-cents, and to do certain repairs, and deliver possession on the first of April, 1820; and that he then voluntarily delivered them up: and he expressly denies that he ever received from John A. Boyd, or any other person or persons, any money which he retained on account of interest due from the said Forshee, or which he ought to have credited thereon.

Upon looking very carefully into the bill and answer, I am of opinion that the answer, as to these matters, is sufficient, and that the complainant's equity is denied. The answer might have been differently shaped, but it is not always easy to frame one so as to be above the reach of critical exception. By adhering too closely to the letter of the bill, an answer is oftentimes obnoxious to merited reproach. By taking what may be considered the spirit or substance of the bill, the precise point is sometimes evaded. In the one before me, I have not discovered any attempt at concealment or evasion; and as to the principal matters on which the complainant's equity must rest, I consider it sufficiently full.

Lastly, the complainant's charge that Forshee released to him

his equity of redemption; and it is objected that the defendant has not denied it. This is not denied; on the contrary it is admitted; but it cannot influence the decision of this question. As the case now stands it is totally immaterial, and no equity can grow out of it.

Let the injunction be dissolved.

# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

## STATE OF NEW-JERSEY,

JANUARY TERM, 1832.

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### REBECCA BULLOCK v. BENJAMIN ZILLEY, SURVIVING EXECUTOR OF JOHN BUTCHER, DECEASED, AND OTHERS.

John Butcher, the testator, directed all his property to be sold, and vested the proceeds, after payment of debts, in his executors as trustees; directing them to divide it into two equal parts. One part or moiety he orders them to place at interest, and pay the interest arising annually to his daughter Elizabeth, during life, and if she should die without leaving a child or children living, then to pay the interest, annually, to the support and maintenance of *his nephew Thomas Bullock, and Rebecca his wife, and their children.* The other moiety or half part he directs his executors to pay, in their discretion, to the support and maintenance of *his nephew Thomas Bullock and his family;* that is to say, John B. Bullock and all the children born to the said Thomas. After the testator's death, in 1821, the executors accounted before the orphan's court, and acknowledged a balance of eight thousand four hundred and sixty-eight dollars and twenty cents in their hands. In 1826 the testator's daughter Elizabeth died, without issue. In 1829 Rebecca Bullock was divorced from her husband Thomas Bullock, by act of the legislature; after which the executors refused payment to her. Upon demurrer to a bill filed by her against the executors, for support out of the interest of the first moiety;—HELD, that from her being distinctly named in the first bequest, as one of the objects of the testator's bounty, and the entire difference in the language used by testator in that and the bequest of the other moiety; the testator intended that Rebecca, the wife of Thomas Bullock, should have a personal and individual interest in this bequest, and not simply an interest *as* the wife of Thomas Bullock or a member of his family.

It is the same as though the will had said, the interest should be paid annually to Thomas Bullock, and Rebecca Bullock, and their children. Even during

the coverture the complainant had a vested beneficial interest in the annuity, which could have been enforced against her husband.

The words "*his wife,*" as applied to the complainant in the first bequest, are to be taken as mere words of description, of the person intended to take, not that she must necessarily be the wife of Thomas Bullock, and take only in that capacity: and her interest in the bequest is not affected by the divorce.

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The following facts are sufficient for the proper understanding of the question raised by this demurrer.

In February, 1818, John Butcher, late of Burlington county, made his last will and testament; in which he directed all his property, real and personal, to be sold by his executors, and the proceeds, after paying debts, he vests in their hands as trustees, directing them to divide it into two equal parts.

One part or moiety he orders placed out on interest, and to pay the interest annually arising to his daughter Elizabeth, during her natural life, that she may have a comfortable support; and if his said daugher should marry and have a child or children living at her death, then the principal to be paid to them. If she should die without such child or children living at her death, then his order is that the principal sum shall be kept out at interest, and the interest paid annually to the support and maintenance of his nephew *Thomas Bullock, and Rebecca his wife, and their children,* including John B. Bullock, who was born before marriage.

The other moiety or half part he directs his executors to pay, in their discretion, to the support and maintenance of his nephew Thomas Bullock and his family; that is to say, John B. Bullock and all the other children that may be born to the said Thomas during his natural life.

In case Thomas should die leaving no lawful issue living, and John B. Bullock should be alive, then the whole of the principal and the unexpended interest shall be paid to him. And if John B. Bullock should die in the life-time of the testator, and the testator should die without lawful issue, then the whole of the estate to be divided equally among his three brothers.

The testator died leaving John B. Bullock and five other children alive. Thomas Butcher and Benjamin Zilley proved the

will as executors. In 1821 they accounted in the orphan's court, and acknowledged to be in their hands for distribution the sum of eight thousand four hundred and sixty-eight dollars and twenty cents.

On the 11th day of February, 1829, the complainant was divorced from her husband by an act of the legislature of this state, and the marriage contract was thereby declared to be dissolved. In 1826, Elizabeth, the daughter of the testator, to whom the use of the first moiety was given, died without leaving a child or children living.

The bill then charges, that since the granting of the divorce, the executors refuse to pay to the complainant any part of the interest accruing on the first moiety of the said balance so acknowledged by the executors to be in their hands; and it prays that she may be allowed such portion of said interest as may be sufficient for her maintenance, or so much as the court may direct.

No claim is made for any portion of the second moiety, which is directed to be paid at the discretion of the executors for the support of Thomas Bullock and his family.

The defendants have demurred to this bill, and assign as cause of demurrer, that it appears on the face of the bill that the complainant has been divorced from her husband and the marriage contract dissolved; and that by the true and lawful construction of the will of the said John Butcher, deceased, she can receive benefit under it only in the character of wife of Thomas Bullock; and that, having by her own showing and admission ceased to be such wife, she is not entitled to the relief prayed for in her said bill.

*G. D. Wall*, for the complainant;

*E. B. Cannon*, for the defendants.

The Chancellor. As the complainant in her bill does not call in question the act of the legislature dissolving the marriage contract, but admits its validity, and comes into court claiming rights notwithstanding she is no longer the wife of Thomas Bullock, the only question that can be raised is this: whether the

words "his wife," as applied to the complainant in the bequest, are to be taken as mere words of description: if so taken, the rights of the complainant are not affected by the divorce; but if the person taking must necessarily be the wife of Thomas Bullock, and take in that capacity, then her interest is at an end.

In cases of this description, the intention of the testator must govern: the difficulty is to arrive at it with a sufficient degree of certainty to satisfy the mind. From the best consideration I have been able to give this case, I incline to the opinion that the testator intended that Rebecca, the wife of Thomas Bullock, should have a personal and individual interest in this bequest, and not simply an interest in it as the wife of Thomas Bullock, or a member of the family. And I draw this conclusion from the following circumstances.

1. *She is mentioned by name.* The interest is to be paid annually to the support, not of Thomas Bullock and his family, or Thomas Bullock and his wife and family, but of Thomas Bullock, and Rebecca his wife, and their children. Had Rebecca died, and Thomas Bullock married another wife, she could have taken no personal interest under this will either as wife or as one of the family. The persons to be benefitted by the bounty of the testator are distinctly named; and, as it regards the present complainant, it is the same as though the will had said, the interest should be paid annually to Thomas Bullock, and Rebecca Bullock, and their children. Even during the coverture, the complainant had a vested beneficial interest in the annuity, which could have been enforced against her husband.

2. If the defendants' construction be true, that the complainant can only take as the wife of Thomas Bullock, then if it had so happened that Thomas Bullock had died in the life-time of the testator, his interest would have lapsed, and the complainant, though a widow, could have taken nothing, she not being at the time the wife of Thomas Bullock, the legatee. It can scarcely be imagined that this was the intention of the testator.

3. And again, if the defendants' construction be the true one, then in case the husband, Thomas Bullock, had died at any time after the decease of the testator, the complainant's interest would have ceased, she being no longer his wife, in the language of

the will. No good reason can be assigned for such a construction. And that it would operate unjustly and with hardship, by taking away support and maintenance at a time when it would be most needed, is a sufficient inducement for the court to lean against it, and favor one more in accordance with the charitable intentions of the testator.

4. Another circumstance, which induces a conclusion favorable to the claim of the complainant, is this; that the testator, in directing the manner in which the other moiety or half part of the fund is to be appropriated, makes use of language entirely different from that used in relation to the first moiety, and excludes the complainant altogether from any direct interest in it. That moiety he directs his executors to pay, in their discretion, to the support and maintenance of his nephew Thomas Bullock and his family; that is to say, John B. Bullock and all the other children that may be born to the said Thomas during his natural life. The fact that the interest in this last moiety is confined expressly and guardedly to the use of Thomas Bullock and his children, shows that the distinction was made understandingly; and is persuasive evidence that the testator intended, by constituting the complainant one of the objects of his bounty as to the first moiety, that she should have a direct and personal interest, which should be appropriated to her personal support. I can see no other reason for the difference made in the disposition of the two moieties.

Upon what grounds the parties were divorced, or which complained of the other, I am not informed. The bill simply alleges the fact of the divorce. The demurrer admits it as stated, and the court can look no further than the pleadings. I am not aware, however, that any development of facts can change the legal rights of the parties.

Considering the case, then, simply upon the intention of the testator, as collected from the will itself, my conclusion is, for the reasons above stated, that the complainant is entitled to relief, and that the demurrer be overruled, with costs.

Demurrer overruled.

JOHN SMITH, ADMINISTRATOR OF SILAS AXTELL, DECEASED, v. SAMUEL L. AXTELL, HENRY AXTELL, AND CHARLES ROFF AND PHEBE HIS WIFE.

The bill should be framed to meet the case, so that the *allegata* and the *probata* may agree, with reasonable certainty. It is as important that this rule should be adhered to in this court as in a court of law.

Where the bill goes on an original agreement in writing, and does not mention the loss of it, so as to admit of any evidence in lieu of it; parol evidence of its contents, or a paper purporting to be a copy of it, is not sufficient: but the pleadings may be amended to get at the merits of the case.

If the original agreement has been lost, and due diligence has been used to recover it, but without effect; a copy may be received, or if there be no copy the party may resort to parol proof of the contents.

The complainant is competent to prove the loss.

But his testifying, that the paper was in his possession some time, and he left it with the arbitrators, (to whom the matter had been referred,) since which he has not seen it: that he has often searched for it among his own papers, the papers of his decedent, and wherever he supposed it probable it might be found, but could not find it, and believes it lost or destroyed; and one of the arbitrators stating, that the original agreement was before the arbitrators at their first meeting, that he has seen it since, but does not know what has become of it, (the other two arbitrators not having been examined, or called on,)—is too indefinite to show the loss of the original agreement, and warrant the introduction of secondary evidence.

Where, after administration granted, it was found that the personal estate was insufficient to pay debts; and the elder children, having been advanced in money and goods, agreed with the administrators, in writing, to account for the advancement made to them, to save the real estate from being sold for the payment of debts, and to do justice to the younger children who had received nothing from their father; such an agreement is equitable in itself, and should be carried into execution.

And the fact, that after the agreement, the authority of the administrators who made it had been revoked, and administration granted to the present complainant, does not present any obstacle to the execution of the agreement.

Silas Axtell, late of Morris county, died in 1823, intestate, leaving a widow and several children, viz. Samuel, Henry, Amzi, Phebe wife of Charles Roff, John, Jacob, and Jonathan—the two last being minors. He also left three grand-children, the offspring of his daughter Mary, late the wife of Daniel Thompson, 3d. Letters of administration were granted to Henry Ax-

tell, John Axtell and Charles Roff. The deceased left a small personal estate, and a farm in Mendham township of one hundred and sixty acres. The bill filed in this case sets forth, that the personal property was altogether insufficient to pay the debts of the decedent; and that the older children, having been advanced in money and goods, agreed to account for the advancements thus made, and thereby not only save the real estate from being sold for the payment of debts, but do justice to the younger children, who had received nothing from their father. In pursuance of this agreement, Henry Axtell, Charles Roff, and John Axtell, the administrators, and Samuel L. Axtell, the oldest son, entered into an article of agreement in writing, whereby they all agreed to make a settlement as heirs with the administrators; and if upon such settlement for money or property advanced to either of them, they or any of them should fall in debt, they pledged their respective shares of the realty to the administrators to secure the payment of the same, if it should be found necessary to pay the just debts of the deceased, or to make the other heirs equal. Under this agreement, Samuel settled with the administrators on the 28th February, 1824, (being the same day on which the agreement was made,) and acknowledged a balance due the administrators of one hundred and forty-four dollars and eighty-six cents. After this, the letters of administration that had been granted to Henry Axtell, John Axtell, and Charles Roff, were revoked, and administration was by consent committed to John Smith, the present complainant; and he alleges, that on taking an inventory there was a deficiency of personal assets of nearly seven hundred dollars, exclusive of the debts due from the children. The claim against Henry Axtell, under the aforesaid agreement, was referred to arbitrators, who awarded that he should pay the administrator four hundred dollars. Daniel Thompson, 3d, submitted the claim against his deceased wife to the same arbitrators, who reported that there was due from him to the administrator the sum of one hundred and ninety-four dollars and fifty-eight cents. The bill then charges, that Charles Roff, although his wife had had considerable advances from her father, after delaying the complainant on various pretences from time to time, at length refused to settle or make any allowance

whatever; and that the other heirs have also refused to pay the amounts so found due from them as aforesaid; and then prays that the said agreement may be enforced, and the defendants come to an account for the sums due respectively, and be decreed to pay the same. The bill was filed in July, 1825. None of the defendants having answered, or pleaded in any way, the complainant in July, 1827, obtained an order to take depositions and proofs in support of his bill. Under this order, papers and documents were produced, and a number of witnesses examined; after which the cause was set down for argument ex parte; and in October, 1829, an order was made referring it to a master to take an account against Charles Roff, and ascertain the amount of his indebtedness to the administrator, which indebtedness is said in the order satisfactorily to appear. After this, to wit, in October, 1830, Charles Roff and wife filed their answer to the bill, it is presumed with the complainant's consent. Their answer, so far as it is necessary to advert to it at this time, states that Silas Axtell, deceased, gave to his daughter, the wife of Charles Roff, after her marriage, sundry articles of personal property, as an outfit, amounting to, perhaps, one hundred and fifty dollars; but claims that it was an absolute gift and not an advancement, and that they are not bound to account for the same, there being no charge made in the account-book of the intestate. Charles Roff denies that there was such an agreement as is set out in the bill, and says that the instrument entered into was not under seal, and was simply to this effect, that the administrators individually would settle all demands that the estate had upon each, upon the same principles that Samuel Axtell would settle upon; which was, that he should be responsible for any demand that the estate might lawfully have upon him, and which might be made to appear by the books of account of the said deceased; and that it was upon that principle that Samuel settled. They further contend, that as the complainant was no party to the agreement, he has no right to proceed upon it, or take advantage of it in any way; or if he has, that he should proceed at law. They also allege that the complainant, since the filing of the bill, has sold part of the real estate under an order of the orphan's court, and has rendered no account of the same: they are

therefore unable to say, but they confidently think, that the personal assets, together with the proceeds of such sale, are sufficient to pay all the debts.

*Th. Frelinghuysen*, for complainant;

*I. H. Williamson*, for defendants.

THE CHANCELLOR. There does not appear to have been any additional testimony taken after filing this answer, and some important facts are not adverted to at all in the testimony taken ex parte under the original order, and which has been used by both parties on the argument of the cause. The case comes up under very embarrassing circumstances, and in such a way as to render it impossible for the court to make a final disposition of it, and at the same time satisfy itself, or do justice between the parties. There are, however, one or two questions which may be as well disposed of at this as any other stage of the cause.

The first is, whether the agreement set out in the complainant's bill, and upon which his suit is founded, has been sufficiently and legally proved. It is contended by the defendants that it has not.

The bill mentions a written agreement, of the date of February 28th, 1824; and although it would seem as if it was intended to give only the substance and effect, and not the tenor of it, it is nevertheless set out *in hæc verba*: "This article of agreement, made," &c. It turns out from the evidence, that the original article was not produced before the master, but only a paper purporting to be a copy of it; and that upon the ground of the loss of the instrument, parol evidence of its contents, and also a paper purporting to be a copy, was received. It is contended, in the first place, that parol evidence of the contents of the paper, or any other secondary evidence, cannot be received, inasmuch as the bill goes upon the original agreement, and does not allege the loss of it, so as to admit of any evidence in lieu of the original article. This is technically correct. The bill should be framed to meet the case, so that the *allegata* and the *probata* may agree, with reasonable certainty. And it is as important

that this rule should be adhered to substantially in this court, as in a court of law. I am not, however, inclined to say that for this reason the testimony must be rejected, and the party turned out of court; for the pleadings may be amended, if necessary, and the object of the parties, as I understand it, is to get at the merits of the case.

Passing by this formal objection, the question before the court is, whether a proper foundation has been laid for the admission of secondary evidence. The allegation is, that the original is lost. If this be true, and due diligence has been used to recover it, but without effect, a copy may be received; or if there be no copy, the party may resort to parol proof of the contents of the instrument. It is agreed on all hands that there was an original agreement relating to the subject matter of this controversy. It was entered into in February, 1824, by Henry Axtell, Charles Roff, John Axtell, and Samuel L. Axtell. It was before the arbitrators, as appears by the testimony of Jesse Upson, esquire, and was not disputed by any of the parties. The complainant is called to prove the loss, and for this purpose he is competent. He says, the paper was in his possession a considerable time, and he left it with the arbitrators when they first met, since which he has not seen it. He has often searched for it, but could not find it. He has searched for it among his own papers, and among the papers of the deceased, and wherever he supposed it probable it might be found, but could not find it, and believes it lost or destroyed. Jesse Upson, one of the arbitrators, states that the original paper was before them, but he does not know what has become of it. Besides this, I do not discover any evidence of the loss of the paper; and although in this case I should be inclined rather to relax than to adhere strictly to the rule, I feel satisfied that this is altogether too indefinite to warrant the introduction of parol or secondary evidence. The complainant's testifying that he has searched for it among his papers, and the papers of the deceased, is not sufficient. He had before stated that he left it with the arbitrators, and had not seen it since. The search he made must have been merely for the sake of form, and not with any view of finding the instrument. It was left with the arbitrators, and it is remarkable that not one of them

has been called on with the view of ascertaining whether it was in their possession. Jesse Upson, it is true, was examined as a witness. He says he has never seen the original paper or agreement since the meeting of the arbitrators, and does not know what has become of it. Now this may be, and yet the paper be in his possession. He does not say that he has ever been called on to examine his papers, or that he has ever searched for it. The fact that he has not seen it, or does not know what has become of it, is no proof that it is not in his possession. The other two arbitrators with whom the paper was left, and in whose hands it is last traced, were not examined, nor does it appear that they have ever been called on, or that any inquiry has been made of them respecting it. It was attempted to be shown on the argument, that Jesse Upson was the active arbitrator, or the business man among them; and it was argued, that if he had not the instrument, and it was scarcely supposable that either of the other arbitrators had. This is argument merely; for it does not appear that Judge Upson was the active man; we may presume so from our private knowledge of his business habits and of the general estimation in which he was held, but that furnishes no ground for a judicial opinion. It it shown, however, that even as it regards Judge Upson, the evidence is insufficient. It does not prove that the paper is not in his possession, and therefore the argument itself is unsound. Nor is the case aided by the complainant's stating he had searched for it wherever he supposed it probable it might be found. He should have stated where he searched, that the court might judge whether it was in good faith. If such general allegations were admitted, it would supercede the necessity of pointing out any particular places, and a salutary rule of law would be easily evaded, if not wholly destroyed.

The conclusion is, that there is no sufficient foundation for admitting secondary evidence, whether it be a copy or parol. In this case, the paper produced as a copy cannot be considered as such. It has not been compared. The witnesses who state it to be a copy, speak only from their recollection of the original, and not from any actual knowledge. But if it were an actual compared copy, it would not alter the case. It would be secondary

evidence still, and inadmissible without first satisfactorily showing the loss of the original, which has not been done.

Notwithstanding this conclusion, I am unwilling to preclude the rights of the complainant and dismiss his bill. I incline to think he has equity in his case, if it can be reached. If the agreement is proved to be such as is set out in the bill, I see no good reason why it should not be enforced. That the administrators have been changed, does not present any serious difficulty to my mind. The object of the agreement was to enable the administrators to satisfy the debts and exonerate the land. It was made in good faith, and was equitable in itself, and justice requires that it should be carried into execution, if properly proved.

The court would recommend that the parties consent to the further taking of testimony respecting the loss of the paper, and that the defendants also produce evidence to the fact alleged by them, that the administrator has sold land of which he has made no account. This is important to settle the rights of the parties. This cause has been conducted with considerable irregularity and tardiness; but as the course pursued has been consented to by both parties to reach a proper result, and to have the cause settled on the merits; and as the defendants have been let in to answer after default, and after testimony taken against them, the hope is indulged that the course intimated by the court will be adopted. If it should not, I will listen to an application on the part of the complainant for leave to take further testimony, and be inclined to grant him such aid as may be consistent with the rules and practice of the court.

GEORGE MICKLE, EXECUTOR OF SAMUEL MICKLE, DECEASED, v. JOHN RAMBO AND OTHERS.

Where A. has a first mortgage on two lots, and B. takes a second mortgage on the first lot only; he may, as between him and the first mortgagee, compel the satisfaction of the first mortgage out of the second lot, as far as the proceeds will go.

A release, afterwards given, by the first mortgagee to the mortgagor, of all his interest in the second lot, will not prejudice the second mortgagee, unless he assented to it.

The purchaser of the equity of redemption of the first lot, subject to both mortgages, in order to redeem, would have to pay the whole of the second mortgage covering the first lot only, and a ratable portion of the first mortgage on both lots, according to the value of the two lots.

Upon a subsequent sale of the first lot, on a bill filed by the first mortgagee, the proceeds are to be applied to satisfy, first, a ratable portion of the first mortgage, then the whole of the second mortgage, and subsequent incumbrances on the first lot in their order.

The following facts appear by the pleadings and evidence:—

1. On the 7th March, 1815, Apollo Woodward gave a mortgage to Samuel Mickle for one thousand dollars, on two lots in Gloucester county, the first being a tavern lot in Woodbury.

2. On the 5th April, 1818, Woodward gave a mortgage to Joseph Shinn, for twelve hundred dollars, on the tavern-house and lot; which mortgage was afterwards assigned to James Cook.

3. On the 26th December, 1818, Woodward sold the equity of redemption in the tavern-house and lot to Marmaduke Wood, subject to the two mortgages.

4. On the same 26th December, 1818, Wood gave to Woodward a mortgage on the same tavern-house and lot for one thousand dollars.

5. On the 1st May, 1819, Mickle, the first mortgagee, released to Woodward all his interest under the mortgage in and to the second lot mentioned in his mortgage; which lot was afterwards sold and conveyed by Woodward to various purchasers.

6. On the 29th August, 1820, Wood gave to Rambo a mort-

gage on the tavern-house and lot for fourteen hundred and seventy-six dollars and eleven cents: And,

7. On the 1st September, 1820, Wood executed to Rambo an assignment of all his property, in trust, for the benefit of creditors.

Mickle, the executor of the first mortgagee, has filed his bill to sell the mortgaged premises.

The only defendant who has answered is John Rambo. He states in his answer, that the lot released by Mickle to Woodward was worth twelve hundred dollars; and that when he, (Rambo,) took his mortgage, he did not know of the release. He insists that the whole value of the released property must be deducted from Mickle's mortgage, and the balance only be raised out of the tavern-house and lot.

The tavern-house and lot have been sold, under an order of the orphan's court, for the sum of three thousand seven hundred dollars; and the master, pursuant to directions given him, has reported that the value of the second lot, released by Mickle, at the time of the release, was one thousand and fifty dollars, and that the relative value of the two lots is as seven to one; or, in other words, that the first mentioned lot, being the tavern-lot, is worth seven times as much as the other.

*Wall*, for complainant;

*Armstrong*, for defendant.

The Chancellor. It is submitted to the court to direct the disposition of the money, and this must depend on the operation to be given to the release.

Mickle's mortgage covered the whole property, including both lots. Shinn's mortgage covered the first lot only. If the controversy was between these two mortgagees, on general principles, and independently of any release, Shinn would have a right to compel the satisfaction of Mickle's mortgage out of the second lot, if sufficient to satisfy it; and if not, to have the proceeds of the lot appropriated to that purpose, as far as they would go. Nor would the release affect the rights of Shinn un-

less he assented to it, for the value of the property thus released would be ordered to be deducted from Mickle's mortgage.

But the controversy is between other parties; neither Shinn, nor his assignee, Cook, claim any special rights.

Rambo claims under Wood, who stood at the time he gave the mortgage to Rambo, and made the assignment of his property to him, as the purchaser of the tavern-house and lot, subject to the two mortgages to Mickle and Shinn. If as such purchaser, he had sought to redeem that lot, he would have had to pay the mortgage to Shinn, and also a proportion of Mickle's mortgage, according to the relative value of the two lots. He could have compelled the second lot to pay its proportion only, according to its value, and could have had no right in equity to throw the whole burden of the mortgage on that part of the property.

Such was the right of Wood. Rambo claims under him, and stands in his place. And Mickle having released his interest in the second lot, the proportion of his mortgage which that lot was liable to pay, must be deducted from the amount now due him by the report of the master. This proportion is ascertained to be the one-seventh part.

There is no evidence to show that Shinn was consenting to the release, and therefore his rights, or those of his assignees, are not affected by it.

I do not perceive that the case is varied by the fact that Marmaduke Wood, in 1819, after his purchase, engaged to pay Mickle's bond. This does not destroy the claim of Mickle on his mortgage. It is doubtful from the instrument itself, whether it was intended for the benefit of Mickle or Woodward. If for Mickle, it was adding the personal security of the purchaser to that of the mortgagor. If for Woodward, it was in the nature of an indemnity. Taken either way, Mickle's claim on his mortgage is not affected by it.

Let the one-seventh part of Mickle's mortgage be deducted, and the balance be satisfied out of the fund, together with costs, and let the residue be applied to the succeeding incumbrances in their order.

CITED *in Gaskill* v. *Sine*, 2 *Beas.* 401.

JOHN BUCKLEY v. ISRAEL CORSE.

The distinction in the English books, between a common injunction which issues on some default of the defendant, and special injunctions granted on special application to the court, is of no importance. All injunctions here are granted on the merits and on special application to the court, and generally *ex parte*, on filing the bill.

Whether notice shall be given depends on no settled rule of practice, but on the nature of the case. If it be one of great difficulty or importance, the court will generally require notice to be given.

After filing the bill, and appearance, application for injunction may be made without notice, and if it be a case that requires it, notice will be ordered.

Where application for injunction is made after answer filed, notice is necessary according to the thirtieth rule of practice; but even then it may be dispensed with.

An injunction allowed by a master on application after answer, and without notice, is irregular, unless the notice was dispensed with by the master; which, if it be a proper case, may be presumed to have been done.

If there was no dispensation, the court would not set aside the injunction simply for that reason, if it appeared to be a case in which the rule might properly have been dispensed with; but would retain it, and order the complainant to pay the cost of the application.

The general principle is, that a party is bound to state all his case in his first bill. But if the complainant, after filing his bill, discover that he has omitted to state any matter, or to join any person as party to the suit, he may supply the defect by amendment.

If the defendant has answered, and the complainant thereby obtains farther knowledge of facts or circumstances which may aid him in the case, he may amend his bill, and proceed according to the information thus obtained.

In general, any imperfection in the form of a bill may be remedied by amendment, as occasion may require, if application for that purpose is made in time.

Before replication, the order to amend is granted of course.

After an injunction dissolved on the merits, the party may amend and obtain an injunction on the amended bill.

First amendments are frequently allowed on coming in of the answer, without special affidavits, on reasonable terms.

Injunction bills have been amended without prejudice to the injunction, and even amended a second time; but the application for such second amendment must disclose its nature, and be founded on affidavit that the complainant had not a knowledge of the facts so as to enable him to bring that case on the record sooner.

The complainant's bill stated, that he had purchased at sheriff's sale, property on which the defendant had a mortgage, which the complainant supposed to

be prior to the judgment under which he purchased. That the defendant filed a bill on this mortgage, obtained a decree, and the property was about to be sold, when the complainant gave to the defendant an absolute deed, upon an understanding, that he should be at liberty to redeem on paying the amount due on the mortgage. That after he had paid divers sums thereon, he discovered that the judgment under which he purchased was older than the defendant's mortgage. The bill prayed that the deed made to the defendant might be set aside, and he compelled to account and to refund the money paid by complainant under misapprehension of his rights; and for an injunction to stay proceedings on an ejectment to recover possession of the premises. On filing the answer, which denied the priority of the judgment, and showed that it was subsequent to the defendant's mortgage, the injunction was dissolved. The complainant, with leave, then amended his bill, admitted his mistake in the date of his judgment, and that it was subsequent to the defendant's mortgage, and prayed that the deed made by him to the defendant might be declared a mortgage, and he permitted to redeem on paying the balance due, and for an injunction to prevent his being turned out of possession; which was allowed by the master on the complainant's depositing the balance due on the mortgage with the clerk of the court. On a motion to dissolve this second injunction, on the ground that it was irregular, being a special injunction granted after appearance and without notice; and because the amendment was not warranted, a new case being made by the amended bill, the merits of which were not disclosed by the original bill. The application was overruled, and the injunction retained; but the complainant was ordered to pay the costs, up to the time of filing the amended bill, and the cost of the application to dissolve.

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The original bill in this cause, was filed in April, 1831. The complainant stated that he was a purchaser at sheriff's sale, of certain property, on which the defendant had a mortgage for one thousand dollars. This mortgage he supposed to be prior to the judgment under which he purchased, and accordingly made some arrangements with the defendant for discharging it. That some time after, Corse, the present defendant, filed a bill against the heirs of Amos Buckley, the mortgagor, (of whom complainant was one,) the heirs of Charles Coxe, deceased, and others, to foreclose the equity of redemption and for a sale of the mortgaged premises; and the complainant, having understood that the mortgage, so far as it affected the property he had purchased, was given as a collateral security only, and believing he could not be affected by the suit, as he supposed the real controversy was between said Israel Corse and the heirs of Coxe, as mort-

gagees, did not appear to the suit nor make any defence. A decree was obtained, and he was ignorant that his property was to be affected by the decree, until he saw it advertised by the sheriff. Supposing then that the property was liable, and the sheriff being about to sell it, the complainant agreed to make a deed in fee to the defendant, on condition that he might redeem in a certain mode and time then agreed on. The bill then charges that the complainant made several payments under this arrangement, and that Corse afterwards brought an ejectment against him, upon which a judgment was entered in 1827, and an execution issued for the costs, which were paid. That the complainant has lately discovered that he has totally misapprehended his rights; that his title under the sheriff's deed is prior and paramount to the defendant's mortgage, and insists that he is entitled to hold the property discharged of any claim of the defendant; that the defendant is nevertheless about to take out and execute a writ of *habere facias possessionem* on the judgment in ejectment, and threatens to turn the complainant out of doors. The bill prays that the defendant may be compelled to come to an account for the moneys paid by the complainant under a misapprehension of his rights, and improperly received by the defendant, and that he may be restrained from taking possession of the premises under the suit. The injunction was allowed.

The defendant, in his answer, denied the fact alleged by the complainant, that his purchase at the sheriff's sale was under a judgment prior to the recording of the mortgage of the defendant, and showed satisfactorily that the mortgage was recorded ten months before the rendition of the judgment. The whole equity of the case resting on this point, the injunction was, of course, dissolved.

After the dissolution, the complainant applied for leave to amend his bill, so as to make it a bill to redeem. Leave was granted, on the representation that the amendment was assented to by the counsel of the defendant. The complainant then filed an amended bill, in which he admitted the priority of the mortgage for one thousand dollars on the premises, and insisted that the deed given in satisfaction of it was in the nature of a mortgage, having attached to it a right of redemption; that there

was but a small amount due, which he was willing to pay. He prayed permission to redeem, and that he might have an injunction to restrain the defendant from taking possession, &c. The injunction was allowed by the chief justice, acting as injunction master, in the absence of the chancellor, on the complainant's depositing with the clerk of the court three hundred and four dollars and twenty-one cents, being the sum computed to be due.

*I. H. Williamson*, for the defendant, moved to dissolve the last injunction.

*N. Saxton*, for complainant, opposed the motion.

THE CHANCELLOR. It is now moved to dissolve the injunction on two grounds :—

1. Because allowed without notice, and therefore irregular; it being a special injunction, which cannot be granted on an ex parte application, after appearance.

Such is, no doubt, the English rule: *Morasco* v. *Boiton*, 2 *Ves.* 112; *Wyatt Prac. Reg.* 238; 1 *Newl.* 219. According to the English practice, injunctions are applied for, sometimes before answer, and sometimes after, upon the merits disclosed. If great injury would likely ensue by waiting till an answer is put in, the injunction will be granted before answer. In like cases, the court will in some instances grant an injunction upon an *ex parte* application, even after appearance: *Harrison et al.* v. *Cockrell et al.* 3 *Mer.* 1; 1 *Newl.* 219. In the English books, a distinction is made between common and special injunctions. When an injunction issues for a default of the defendant, either in appearing or answering, it is called a common injunction. Special injunctions are such as are granted only upon special application to the court. According to our practice this distinction is not of much importance. All injunctions here are granted upon special application; and these applications are generally made *ex parte* on filing the bill. Whether notice shall be given depends upon no settled rule of practice, but on the nature of the case. If it be one of difficulty and importance, the court will generally require notice to be given.

I do not consider it necessary, in cases where an injunction is applied for after filing the bill, and after the defendant has appeared, that notice of the application should be given, merely because there has been an appearance. The application may be made without notice, and, if it be a case that requires it, notice will be ordered. Where the application is made after answer filed, notice is necessary, according to the thirtieth rule of practice, but even then it may be dispensed with by the chancellor. If this is to be considered as an application after answer, the injunction being without notice, is irregular, unless the notice was dispensed with by the master, and the presumption is that this was done. If there was no dispensation, the court would not set aside the injunction simply for that reason, if it appeared to be a case in which the rule might properly have been dispensed with, but would retain it, and order the complainant to pay the costs of the application.

The difficulty in this case arises from the fact, that this is an amended bill; that the injunction issued on filing the original bill has been dissolved upon the merits on the coming in of the answer, and that now after amending the bill, a second injunction has been granted without notice. We have no rule of practice extending to such a case. The English practice requires a notice: *Edwards* v. *Edwards*, 2 *Dick.* 755. Some of the later authorities maintain that in addition to the notice, the defendant must be in default for not answering, before the injunction will be awarded: *James* v. *Downes*, 18 *Ves.* 522. From the whole taken together, it is plain that when a bill has been amended after injunction dissolved, a party cannot take the ordinary injunction *nisi*. There must be an application upon the merits; and in such cases notice is required. According to our practice all injunctions are granted upon application, and are upon the merits, and may be considered as special injunctions in one sense of the term; but it does not follow that notice is to be given in all cases. Our rules require it in one case only, and even then it may be dispensed with, as has already been mentioned. From this circumstance, and from analogy to our practice, I am of opinion that notice was not indispensable to the application, and that it

rested with the master to determine whether it should be given or not.

2. The second reason assigned is, that the amendment was unwarranted by the practice of the court, inasmuch as the merits of the case must be disclosed in the original bill; that here the injunction is upon a new case made in the amended bill.

The general principle is, that a party is bound to state all his case in his first bill; but the practice of the court is very liberal as to amendments. If the plaintiff, after filing his bill, discovers that he has omitted to state any matter, or to join any person as party to the suit, he may supply the defect by amendment. Or, if the defendant has answered, and the plaintiff thereby obtains further knowledge of facts or circumstances which may aid him in the cause, he may amend his bill and proceed according to the information thus obtained; and in general, any imperfection in the frame of a bill may be remedied as occasion shall require, provided the application for that purpose be made in proper time: *Coop. Eq. Pl.* 333. Before replication, the order to amend is granted of course: 1 *Newl.* 192. Injunction bills have frequently been amended without prejudice to the injunction, and even amended a second time; but the application for such second amendment must disclose its nature with precision, and must be founded on affidavit that complainant had not a knowledge of the facts, so as to enable him to bring that case upon the record sooner: *Sharp* v. *Ashton*, 3 *Ves. and B.* 144. I am not aware that such strictness of practice has obtained upon first amendments. They are frequently allowed on the coming in of the answer, without special affidavits, upon such terms as are reasonable. My opinion is, there is nothing objectionable as to the time of the amendment, and that an affidavit disclosing the facts was not necessary.

I have had doubt as to the extent of the amendment. The bill has been redrawn, and changed to a bill to redeem. There is not merely a variation of the prayer for relief, for then the amendment might be made after publication: 5 *Ves.* 485. The facts are so stated in this last bill, as to be altogether incompatible with the prayer of the first. There are no new facts that are very material, but the equity rests on different grounds.

The gravamen of the bill as first presented was, that the complainant had an absolute title to the property, older than the defendant's mortgage; that being ignorant of that fact, and supposing the mortgage to be prior, he agreed to pay it, and gave to the defendant a deed for the premises, subject to a right of redemption, and thereupon paid large sums of money; and that he had lately become acquainted with the fact that his title was anterior to the defendant's. Upon this state of the case, he prayed that the defendant might account to him for the money he had wrongfully received, and which had been paid to him through misapprehension. In the amended bill, he admits his mistake in supposing his title older than the defendant's, but insists upon the other facts stated, that the deed given to the defendant was in equity a mortgage, and subject to redemption, and that he had paid large sums of money in part discharge of the debt. The prayer is for leave to redeem.

It is very clear, that after an injunction dissolved on the merits, the party may amend and obtain an injunction on the amended bill. The amendment may be founded on facts disclosed in the answer. There must always be new facts and charges in the amended bill, and these must be material, or a new injunction would not be ordered. New relief may be prayed and new parties added, and the bill must be framed so as to meet the exigency of the case. One fact often changes the whole equity of the complainant's case, and calls for different relief. The cases on the subject of amendment are without number, and it is difficult to draw from them any broad principle, or draw a line beyond which the complainant may not pass in changing his case. Modern authorities have gone very far. Thus in *Mavor* v. *Doy*, 2 *Sim. and Stu.* 113, the plaintiff by his original bill sought to set aside a deed. After answer filed, he amended his bill, under the usual order, and presenting a different state of facts, sought to establish the deed, and it was allowed.

I feel no disposition to aid the complainant further than justice requires. His first bill was certainly drawn in haste, and without a proper knowledge of facts with which he could easily have made himself acquainted; but it would savor of harshness to see him turned out of possession without the privilege of being

heard. I incline upon the whole to overrule the present application and permit the injunction to remain; but the complainant must pay the costs of the original bill and all the proceedings up to the filing of the amended bill, and also the costs of this motion.

CITED *in Coddington* v. *Mott*, 1 *McCar.* 432; *Seymour* v. *Long Dock Co.*, 2 *C. E. Gr.* 171.

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## ISAAC SKILLMAN v. JAMES VAN PELT ET UX. AND MONTGOMERY AND HILLSBOROUGH.

The testator devised as follows:—"I give and devise to my sons, Abraham and James, my farm whereon I now live; to them, their heirs and assigns for ever—to be equally divided between them—Provided they or their heirs shall pay or cause to be paid to my executors, herein after named, the sum of thirty-five hundred dollars, within eighteen months after my decease; which said sum of money is to be paid by them equally, each one half:" and appointed Abraham (one of the devisees) and a stranger executors. After the testator's death, 31st October, 1820, the executors proved the will, and the devisees entered and took possession of the premises; and on the 25th November, 1820, made partition thereof between them, by mutual releases. Under this will, the devisees took an estate in fee simple in the devised premises, charged with the payment of seventeen hundred and fifty dollars each.

The payment of this sum was not a condition, on the breach of which the right vested in the executors to sell: they could assert their claim under the will only by suit or bill.

The orphan's court could not decree a sale, founded on the supposed breach of any such condition: that remedy exists in this court alone.

James, one of the devisees, being thus seized and possessed of his moiety of the premises in severalty, on the 1st May, 1822, mortgaged it to the complainant for seven hundred dollars. In April, 1822, the executors settled their account in the orphan's court; by which, after paying debts and expenses, there appeared to be a balance in their hands payable to the legatees. In January, 1824, they exhibited to the orphan's court an account of other debts discovered, amounting to thirty-seven hundred dollars, and introduced into the account unpaid legacies amounting to two thousand and forty dollars; which, with expenses, made a deficiency of five thousand seven hundred and forty-eight dollars. This account was allowed by the court, and a decree for the sale of the real estate devised, founded upon it. This account was irregular. The orphan's court cannot decree a sale of real estate for the payment of legacies.

The order of the orphan's court, (made upwards of a year after the death of the

devisor,) could not overreach and destroy the antecedent title of the complainant, under his mortgage from the devisee.

At common law, the heir became personally liable to specialty debts of the ancestor, by reason of the lands descended, to the extent of their value. The statute 3 *W. and M. c.* 14, placed the heir and devisee on the same footing: they are personally responsible after alienation of the estate, as if they still held it: but bona fide purchasers under them never were liable; the lands in their hands are discharged.

Our statute "for the relief of creditors against heirs and devisees," passed 7th March, 1797, extends the remedies to all debts of the ancestor, whether by specialty or otherwise; yet preserves the principle, that bona fide purchasers shall be protected.

The "further supplement to the act making lands liable to be sold for the payment of debts," passed 12th December, 1825, creates a lien on the real estate of the ancestor or devisor, for one year after the decease; and it may be sold by virtue of an order of the orphan's court, if obtained within that time; which presupposes, that before that act no such lien existed.

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Isaac Skillman, the complainant, filed his bill in this court, setting forth, that James Van Pelt, being seized and possessed of the premises in the bill after mentioned, applied to him for the loan of seven hundred dollars, and offered to him as a security for the loan and the interest to arise on it, a mortgage on the said premises. That he advanced the money on the faith of the said mortgage, and that Van Pelt and wife executed to him the mortgage, bearing date the first day of May, eighteen hundred and twenty-two, and that it was duly registered on the eighth day of the same month, pursuant to the statute.

The bill proceeds to state that default has been made in the payment covenanted for in the proviso in the mortgage, and that there is a large arrear of interest due.

The bill further states, that the townships of Montgomery and Hillsborough have in some way acquired possession of the premises, and they are therefore made defendants together with James Van Pelt and wife.

And the bill seeks relief and foreclosure and sale, by the decree of this court.

James Van Pelt and wife do not answer, and as against them there is a decree, pro confesso. The defendants, Montgomery and Hillsborough, come in and answer, that they have no knowledge of the estate of James Van Pelt in the premises, and that they know nothing, except from hearsay, of the debt due

from Van Pelt to Skillman, or of the mortgage to Skillman mentioned in the bill. They admit that they are in possession. And they further answer and claim the premises described in the mortgage, by virtue of a deed of bargain and sale from Abraham Skillman and Abraham Van Pelt, the executors, &c. of John Van Pelt, deceased, to them, bearing date the ninth day of March, eighteen hundred and twenty-five; and they insist, that by virtue of this deed they hold the premises free and clear of the mortgage, and that they, Montgomery and Hillsborough, are the owners of the premises in fee simple.

To this answer there is a replication; and the cause was argued before J. W. Scott, one of the masters of the court, by the direction of the chancellor, he having been of counsel with one of the parties.

*W. Thompson*, for the complainants;

——— ———, for defendants.

Cases cited:—6 *Halst. R.* 1; 4 *Kent's C.* 130; 2 *Atk. R.* 619; 1 *Roper on Wills*, 505; 1 *Cruise D. tit. Condition;* 2 *Dal. R.* 317; 5 *Halst. R.* 259; 2 *Con. R. Wheeler* v. *Walker;* 2 *Black. C.* 156; 2 *Vern. R.* 222, 366; 1 *Salk. R.* 156; 2 *Anst. R.* 506 *to* 514; 1 *Eq. Ca. Ab.* 149; *Rev. L.* 291, 436; *Har. Com.* 130.

Scott, M. It appears in evidence, that John Van Pelt, in his life-time, was the undisputed owner of the premises; and that in and by his will, executed and published in due form of law to pass real estate, *inter alia*, he devised as follows:—"I give and devise to my sons, Abraham Van Pelt and James Van Pelt, my farm whereon I now live, containing about two hundred and thirty-five acres of land, be the same more or less, with all the appurtenances; to them, their heirs and assigns for ever, to be equally divided among them as to quantity and quality, as near as may be: Provided they or their heirs shall pay, or cause to be paid, to my executors herein after named, the sum of thirty-five hundred dollars, good money of the state of New-

Jersey, within eighteen months after my decease; which said sum of money is to be paid by them equally, each one half." And he makes the same Abraham Van Pelt and one Abraham Skillman the executors of that will.

John Van Pelt died, and his will was proved the thirty-first day of October, eighteen hundred and twenty.

Abraham Van Pelt and James Van Pelt, the devisees, entered in and upon the premises immediately after his death, and were seized and possessed thereof; and on the twenty-fifth day of November, eighteen hundred and twenty, made partition of the premises, to each his moiety, by mutual releases. The portion thus allotted to James, on this partition and release, is the land mortgaged by him to the complainant and described in the bill.

James being thus seized and possessed in severalty of the premises, did mortgage them bona fide to the complainant.

It is here to be observed, that the object of the testator was to give precisely the same estate to his two sons, Abraham and James, one of whom he constituted an executor; and that intention, if consistent with the law, and it can be fairly collected from the will, is to be carried into effect.

The defendants, in their evidence and argument, but not in their answer, insist that the personal estate of the testator, John Van Pelt was ascertained as insufficient to pay his debts, and that therefore an order was made by the judges of the orphan's court of the county of Somerset, that the executors should sell the real estate of the testator for that purpose: that the order was made in the term of April, in the year eighteen hundred and twenty-four; and that thus empowered, the executors did sell to them the premises, by deed bearing date the twenty-ninth day of March, eighteen hundred and twenty-five.

By the evidence it appears that the executors twice settled their accounts in the orphan's court of the county of Somerset: on each account there is a decree of allowance, and each account purports to be a final one. By the first of these, in April term, eighteen hundred and twenty-two, it appeared, that after paying all the debts of the testator, there remained a balance in the hands of the executors of twelve hundred and ninety-two dollars and forty cents, to be paid to the legatees named in the

will, exclusive of a certain specific legacy given to one of the legatees, appraised and estimated at two hundred and two dollars and seventy-five cents. By the second account, exhibited in January term, eighteen hundred and twenty-four, it further appeared, that debts were subsequently discovered, and then reported to the orphan's court, exhibiting a deficiency of the personal estate as follows, viz: Debt due Abraham Stryker, Abraham Van Pelt principal and John Van Pelt surety, five hundred dollars. Debt due Cornelius Williamson, Abraham Van Pelt principal, John Van Pelt surety, three hundred dollars. Debt due to Joseph Skillman, from Abraham Van Pelt, principal, John Van Pelt surety, two hundred and fifty dollars. Debt due to Jacob Voorhies, from Abraham Van Pelt principal, John Van Pelt surety, one hundred and fifty dollars. Debt due to widow Stryker, from Abraham Van Pelt principal and John Van Pelt surety, twenty-five hundred dollars. Thus making in the whole a round sum of three thousand seven hundred dollars of debts due from Abraham Van Pelt, one of the executors, to different persons, on all of which John Van Pelt was the surety. Thus it appeared that the newly discovered debts, and for which an order was prayed that the real estate should be sold, were primarily the debts of Abraham Van Pelt the executor, and that the testator, John Van Pelt, was the surety only, and that they amounted to the sum of three thousand seven hundred dollars. The same account exhibits and claims, that there was a further deficiency of the personal estate; and for the purpose of making this manifest, two legacies are introduced, one to Mary Ann Van Pelt for nine hundred dollars, and the other to Elizabeth Van Pelt for eleven hundred and forty dollars, amounting to two thousand and forty dollars; to which are added the expenses of the settlement; and thus making the whole an aggregate deficiency of five thousand seven hundred and forty-eight dollars and one cent. And this account is allowed by the court in all things. This deficiency is adjudged, and there is a decree for the sale of the real estate founded upon it.

The complainant showed by his evidence, that the aforesaid sum of seven hundred dollars, loaned by him to the defendant, James Van Pelt, and for which the mortgage was given, was

paid to the executors, and by them applied to the uses and benefits of the estate; and he claims that he is entitled to have this refunded to him from the equity thence arising. This matter does not appear in the bill or answer.

The complainant has endeavored to impeach this order on the ground of fraud; but I do not see in the course of the evidence any fraud attaching to the two defendants who have answered, nor am I able to observe that they have had any agency in obtaining the order.

It was abundantly proved that Abraham Van Pelt, the principal, before the application for the order, and at the time of the order for the sale of the real estate, had very considerable estate, and no reason has been assigned to me why his property has not been applied to the payment of debts for which he was primarily liable.

True the order is very hard, very irregular, and in great part founded on the false assumption that the orphan's court, thus applied to, may decree a sale of the real estate of the testator for the payment of legacies: that the debts of the testator, and the legacies, and the bequests in his will, may constitute one entire mass, and for the payment of which the orphan's court may decree a sale. It would be a heterogeneous mass indeed. Legatees must look to other and better remedies. They are amply provided, and they are sure. But the order was obtained, and so far forth as it really and bona fide was for the payment of the debts of the testator, it must prevail.

It becomes, then, necessary to inquire, what estate was given by the testator to his two sons in and by the will?

On this subject, I cannot doubt but that it was his clear intention to give them a fee, charged with the payment of the three thousand five hundred dollars. Both took the same estate, and to me it seems absurd to say, that the estate of Abraham was subject to the condition, strictly so speaking, of his paying to himself seventeen hundred and fifty dollars.

This is not a controversy between the devisee and the heir at law, in which the latter relies upon the non-performance of a condition precedent to defeat the estate of the devisee. I am therefore of opinion, that Abraham Van Pelt and James Van

Pelt took under the will of their father an estate in fee, charged with the payment of seventeen hundred and fifty dollars each. That the payment of this sum was not a condition on the breach of which a right vested in the executors to sell. They could assert their claim and exert their right under the will only by suit or bill.

The order of the orphan's court could not overreach and destroy the antecedent title of the complainant, thus established in law and equity. It could sell, by the terms of the statute, only such estate as the heir or devisee had at the time of the making of the order; and nothing can be more certain than that the orphan's court could not decree a sale, founded on a supposed breach of such condition, if it be one. That remedy existed in this court alone.

Nor have the judges of the orphan's court attempted any such order. They have ordered and adjudged that the real estate shall be sold to pay the debts of the testator, and the conveyance by the executors under such order, by the statute, shall vest in the purchaser just such estate in the premises sold, as the heir or the devisee had at the time of the making such order by the orphan's court.

That a bona fide mortgagee, from the heir or the devisee, shall have the benefit of his security, exonerated from all demands by means of any mere debts of the ancestor or devisor, whether by specialty or otherwise, I believe can hardly be questioned.

At common law the heir became personally liable by reason of the lands descended, and to the extent of their value. He inherited subject, personally, to the debts of specialty.

Until the statute, 3 *W. and M. c.* 14, the devisee was in no shape bound, nor was the land liable even in his hands. That statute placed the heir and the devisee on exactly the same footing. They are personally responsible after alienation of the estate, as if they still held it; but purchasers under them, bona fide, never were liable. The statute of wills imposed no obligation on the devisee to pay any of the debts of the devisor, by reason of the devise, and the lands in their hands are and always were discharged.

I take this as a certain and established principle, concurred in by the profession from time immemorial; a purchaser from the devisee has always been held perfectly secure from even specialty debts. Overturning that principle now, would introduce the utmost confusion.

Our statute, passed 7th March, 1797, giving relief to creditors against heirs and devisees, is founded on this assumption. It was drawn, manifestly, by the hand of a master of the subject, and although it extends the remedies to all debts of the ancestor or devisor, whether by specialty or otherwise, yet it preserves the vital principle that the purchaser, bona fide, shall be absolutely protected. Our recent statute, passed 12th December, 1825, the "further supplement to the act making lands liable to be sold for the payment of debts," I think, recognizes the same principle. It seems to me too plain to admit of argument or discussion, that a statute in aid of creditors, and which creates a lien on the real estate of the ancestor or devisor for one year, necessarily presupposes that no such lien antecedently existed; or, at the least, that it was not so extensive or operative.

On the whole, I am clearly of opinion that the complainant is entitled to a decree for the relief he seeks in his bill.

J. W. Scott.

New-Brunswick, Jan. 14, 1832.

Cited *in O'Hanlin* v. *Den, Spenc.* 38; *Bockover* v. *Ayres*, 7 *C. E. Gr.* 16.

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TIMOTHY SOUTHARD AND MARY E. HIS WIFE, LATE MARY E. LUDLOW, GETTY M. LUDLOW, PHEBE ANN LUDLOW, AND DANIEL B. LUDLOW, INFANTS, &c. v. THE MORRIS CANAL AND BANKING CO., ALEXANDER HENDERSON, JUN., ISAAC PERRY, AND FREEMAN WOODS.

There can be no doubt of the power of this court to stay the commission of waste by injunction; it is constantly exercised, and is necessary to the administration of justice.

Even in cases of trespass, courts of equity have repeatedly held, that when the damage was great and irreparable, or by constant repetition calculated to do lasting injury to the inheritance; they would interfere to prevent the evil.

But where the trespass complained of was committed more than a year before the bill was filed, and there is no allegation that the defendants are preparing, or have threatened, to commit similar depredations; there is nothing to authorize an injunction.

The Morris Canal and Banking company, in erecting the dam to raise the waters in Lake Hopatcong, have not exceeded their chartered powers, or used them unnecessarily; it being notorious, that without the waters of Lake Hopatcong their canal would be worthless.

The protracted delay of the complainants, for several years after the dam has been erected, is decidedly unfavorable to the motion for injunction. The application should be prompt.

After the water has been raised to a certain height for several years, and the complainants have submitted to it, they cannot now, because the water has been temporarily drawn off, take advantage of that circumstance to revive the right, and place themselves in the situation in which they would have stood if application had been made years ago.

The sum assessed by the appraisers (as the value of lands and damages) can be no compensation for lands not described in the survey by which the appraisement was made.

Whether upon notice given to the widow in possession, a sum of money assessed to her, without noticing the infant heirs, is intended for the damage to her dower right, or as full compensation for all the injury done to the property, *query?*

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Daniel B. Ludlow, late of the county of Morris, died in 1823, intestate, leaving a widow and four infant children. The real estate of which he died seized, consisted of about one hundred acres of land, situate on the margin of the Hopatcong lake. His widow afterwards intermarried with Timothy Southard, who, with the wife and the infant children, are the complainants in this cause. The bill is filed for an injunction and account. It sets out, that the said real estate was formerly valuable, consisting chiefly of valuable meadow land, and having on it a convenient dwelling-house and a tan-yard. That in November, 1826, the defendants, by virtue of their act of incorporation, proceeded to raise the waters in the lake, by damming up the outlet, in consequence of which the land and property were greatly injured; the dwelling-house was rendered untenantable, and the well filled with pond water. That the overflowing has been continued without consent, from that time to the present, with the exception of a few intervals, when the company have let off the water; and that the company declare their intention

of keeping up the dam, for the purposes of the canal; in consequence of which the complainants must be for ever deprived of their land without any compensation.

The bill then states, that in January, 1831, three of the agents of the company, who are made defendants, cut down and carried away a quantity of wood and timber on the said tract, for the purpose of making a communication between the Hopatcong lake and Woods lake; which cutting was not necessary for the purposes of the canal, nor warranted by the charter. The value of the wood is estimated at fifteen dollars.

The bill then charges, that on the 1st of July, 1831, Mrs. Southard received a notice that the appraisers, appointed under the act of incorporation, to assess the damages sustained by landholders, would meet at Dover to make the assessment; and that no notice was given to the infant complainants. That Southard and his wife appeared, and by counsel protested against any proceeding to preclude them from resorting to the law of the land for redress. That the commissioners refused to make appraisement for damage to any land or property not contained in the survey or map submitted to them by the company, although it was admitted by the agent of the company that a part only of the lands overflowed were embraced in the survey. That in July, 1831, the said appraisers awarded to Mary E. Southard, (late Ludlow,) the sum of five hundred and ten dollars and twenty cents, for the damages she had sustained by the overflow of the lands included in the survey; but no damages were appraised to the infants for the injury to their property or interest in the land. That the sum awarded is a moderate compensation for the destruction of her interest, and that she is not bound by the award; but considering the known insolvency of the company, she offers, to avoid litigation, to accept of the award; and she has repeatedly offered to do so, but the company have constantly refused.

The bill further states, that they have frequently requested the company to make compensation to the infants for the damage done by overflowing their lands, and also that they have requested compensation for damages done to that part of the property not included in the survey, and that the company refuse to com-

ply with their reasonable requests. That in November last the company saw fit to draw off the water from the surface of the pond or lake, whereby the lands of the complainants are left nearly dry, and they hoped the company would desist from again overowing them, until they should make some reasonable compensation for the injury committed: but, on the contrary, they have lately shut their waste gates, and the waters are rapidly rising, and must soon overflow the property and render it valueless.

The prayer of the bill is, among other things, that the defendants may be enjoined from cutting and removing any more wood or timber from the lands of the complainants, and from raising the water in the lake above its natural height.

Upon notice given, affidavits were taken, and the motion for injunction argued before the court, by

*W. Halsted*, for the complainants;

*I. H. Williamson*, for defendants.

Cases cited:—*Eden on Inj.* 104, 115, 138, 140, 164, 165, 269; 1 *John. C.* 11; 2 *John. C.* 162, 272, 463; 3 *John. C.* 282; 6 *Ves. jr.* 137; 10 *Ves.* 192; 2 *Dow.* 536; *Coop. Eq. R.* 77.

The Chancellor. Can the injunction, as prayed for, be granted on either ground?

*First.* As to the alleged waste.

There can be no doubt of the power of this court to stay the commission of waste by injunction. It is constantly exercised, and is necessary to the proper administration of justice. Even cases of trespass have, of late years, been favorably entertained, and the courts of equity have repeatedly held, that where the damage was great and irreparable, or by constant repetition calculated to do a lasting injury to the inheritance, they would interfere to prevent the evil: *Flamang's case*, 7 *Ves.* 308; *Eden on Inj.* 138; *Stevens* v. *Beekman*, 1 *John. C. R.* 318. In this last case, chancellor Kent held, that an injunction might be

granted, under very special circumstances, in a case of trespass; but that it would not be allowed merely to prevent the repetition of a trespass, where the party had an adequate remedy at law.

The complainants' bill presents, as I conceive, no matter for an injunction on the ground of waste. The injury complained of was committed more than a year before the bill was filed. The wood and timber have been removed from the premises. There is no allegation that the defendants are preparing to commit similar depredations, or that they have threatened to do it. There is, then, nothing to authorize an injunction. It cannot make reparation for past injuries; its province is to restrain those that are in contemplation or in progress. The object is strictly preventive.

The bill seeks compensation for the injuries charged, and that an account may be taken. Admitting this to be a proper tribunal for obtaining such redress, the allowance of an injunction can give no aid to the complainants or the court.

*Secondly*, Ought the injunction to issue to prevent the company from letting down the flood-gates, and raising the water above its natural height in the pond?

It appears by the eleventh section of their act of incorporation, that the company are expressly authorized to raise the waters in the Green Pond, and Lake Hopatcong, commonly called the Great Pond, by damming the same, and to use the surplus water thus obtained; all loss and damage to the owners of said ponds and the lands flowed or otherwise used in obtaining water for the canal, being paid for agreeably to the previous provisions of the act. The company, in erecting their dam, have not exceeded their chartered powers; nor have they used them unnecessarily, for it is a matter of general notoriety, that without the water of Lake Hopatcong, their canal would be worthless. The dam is represented to have been built, and the overflowing to have taken place, as early as November, 1826, upwards of five years ago. It is charged that the dwelling-house has been rendered almost uninhabitable, the meadows spoiled, and the garden and tan-yard greatly injured. And yet this in the first time an application has been made for an injunction. This protracted delay is decidedly unfavorable to the present motion.

The object of the injunction, as already stated, is preventive, and the application should be prompt. It is very unusual for a party who has stood still, and seen his adversary erect a nuisance at great expense, and then permitted it to continue for a number of years without complaint, to come into this court for an order to prevent its continuance. To avoid this difficulty, the complainants set up, that the waters have been for some time permitted to escape, so that the lake is now restored to its natural level; and that the company are now about to raise the water to its former height. They insist, that this is a renewal of the nuisance, or an attempt to renew it, which ought to be prevented. It is to be remarked, however, that the defendants are about to do nothing more than they have formerly done. There is no charge that they are about to raise the water higher than formerly, or than it was when the map and valuation were made. The object of the dam was to raise the water in the lake to a certain height. It has been so raised for several years, and the complainants have submitted to it. They cannot now, because the water has been temporarily drawn off, take advantage of that circumstance, so as to place themselves in the situation in which they would have stood, if they had made this application five years ago. It is not sufficient to revive the right which might then have existed.

The complainants insist, however, that the lands of the infant heirs have not been appraised, or paid for in any way; that the sum awarded to Mrs. Ludlow has not been paid to her, and that the defendants should be restrained from raising the water until full compensation is made. The case shows, that appraisers were appointed under the act, and that a valuation took place. The whole damage sustained by this property was assessed by the appraisers, as the defendants contend, at five hundred and ten dollars and twenty cents. The complainants, Southard and wife, insist that this was the damage assessed to the dower interest of Mrs. Southard, and that they refuse to pay it to her. In the return of the appraisers, a copy of which has been exhibited, it appears there is an assessment made to Mrs. Ludlow of five hundred and ten dollars and twenty cents, as above stated: and the quantity of land occupied by the compa-

ny, and for which an allowance is made, is twenty-eight acres and four hundredths, or not quite one third of the farm. If the appraisers intended this as a compensation for the injury done to the whole property, the injunction ought not to issue, because the company have offered to pay the money to the persons entitled, and they have offered to pay it into court. It is not proper for me, at this time, to express any definite opinion as to the intention of the appraisers, or the proper way in which the money should be distributed. The complainants may not choose to accept the sum awarded, and may take the legal remedy. I may say, however, that there is at least a probability, that the sum appraised was intended as a full compensation for all the injury sustained by the property, it then being in the possession of Mrs. Ludlow, in whose favor the award was made. While this probability remains, and the question is unsettled, I cannot consent that an injunction should go on the ground that no compensation has been made or offered.

There was another point raised by the complainants at the hearing, viz: that the defendants overflowed more land than had been described on the map or appraised by the commissioners. This presents a different question from any yet considered. The sum assessed by the appraisers can be no compensation for lands not described in the survey by which the appraisement was made. In view of this, it is proposed to give sufficient security for the amount of damages the complainants might be justly entitled to on that ground. I think this would be right, provided the complainants will signify their willingness to abide the decision of the court, in regard to the distribution of the money awarded by the commissioners. From what passed at the argument, I presume there will be no difficulty on this part of the case.

The injunction is refused, with costs.

CITED *in West* v. *Walker*, 2 *Gr. Ch.* 289.

# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

## STATE OF NEW-JERSEY,

APRIL TERM, 1832.

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### MARIA STAFFORD v. JAMES B. STAFFORD AND JOSEPH B. STAFFORD.

Upon satisfactory proof of the execution and existence of a deed, and the oath of the party that it is lost, secondary evidence of the contents may be admitted.

Evidence going to show that a deed might have been obtained by fraud, misrepresentation, or deception, is not sufficient to support a bill charging that the deed is false, forged, and counterfeited.

The principal object of this bill is to procure a decree of the court, declaring a certain deed of indenture, purporting to have been given by Joseph B. Stafford and the complainant, then being his wife, to the said James B. Stafford, false, forged, and of none effect.

The bill charges that William Holmes, the father of the complainant, died in 1821, and by his will gave to her "one third part of his whole estate." That in 1823, at the age of twenty years, she intermarried with Joseph B. Stafford; who proved to be a man of grossly intemperate and dissolute habits, and soon dissipated her share of the personal property coming to her from her father's estate. That in consequence of his ill treatment she was obliged to quit his house, and, with an infant child, seek shelter in the house of her mother. In 1827 she applied for,

and obtained, a divorce *a vinculo matrimonii*, from the legislature.

That in 1825, the said Joseph B. Stafford, with a view to obtain possession of her share of the land derived under the will, applied to the chief justice for a partition, in the name of himself and the complainant as his wife: that commissioners were appointed, who reported that the land could not be divided without injury and great prejudice to the owners, and thereupon they were directed to make sale of it, according to the provisions of the law.

That one James B. Stafford, the father of Joseph, under pretence of keeping the proceeds of the said sale safely for the use and benefit of the complainant, procured her signature to some writing, which he said was a power of attorney, to enable him to take charge of it: that afterwards, suspecting his intention, and that he was leagued with her husband to get the property in possession for his own benefit, she filed her bill in this court, praying an injunction to restrain the commissioners from paying the money to the said Joseph B. Stafford: that the injunction was granted, and remains in force to the present time.

The bill then charges, that the said James B. Stafford sets up against the complainant, a certain deed of indenture between Joseph B. Stafford and Maria his wife of the first part, and James B. Stafford of the other part; which deed is set out at length, and purports, for the consideration of one thousand dollars, to convey to the said James B. Stafford, his heirs, executors, administrators and assigns, for ever, all the interest of the said Maria Stafford, the complainant, of, in and to the property given her by the will of her father, William Holmes. The deed purports to have been acknowledged before Andrew Rowan, esquire, then a commissioner for taking the acknowledgment and proof of deeds, in and for the county of Middlesex, on the same day it bears date, viz. on the 25th of November, 1824. That on the 25th day of December, 1826, the said deed was recorded in the clerk's office of the county of Middlesex.

It is then further charged, that the said instrument purporting to be an indenture, and the writing purporting to be an acknowledgment before Andrew Rowan, esquire, are, and each of them

is, false, feigned, forged, and counterfeited; and that the names of the witnesses, and of the complainant, as one of the grantors, are also false, forged, and counterfeited; and also that the receipt, purporting to be for the consideration money, and which is endorsed on the said deed, is fraudulent and false, and only placed there to give an appearance of authenticity to the pretended transaction.

Against the effect of this conveyance, so set up by the said James B. Stafford, the complainant seeks to be relieved.

The answer of James B. Stafford denies expressly the charge, that the deed and acknowledgment are forged or fraudulent; and states, that after the marriage of his son, Joseph B. Stafford, with the complainant, and while they lived together, they frequently applied to him for assistance: that he made frequent and large advances to them for their benefit, and was called on to make more, which he refused to do unless secured: that thereupon the said Joseph B. Stafford and wife, with the view of obtaining further relief, voluntarily proposed and offered to sell and release to him all their remaining right under the will of William Holmes, deceased, the father of the said complainant: that being willing to oblige them, this defendant acceded to the proposal, and afterwards, viz. on the 25th of November, 1824, the conveyance was executed for the sum of one thousand dollars, bona fide paid and secured to be paid, and acknowledged before Andrew Rowan, esquire, commissioner. The defendant admits that the deed was not recorded until two years after its execution; and states that he procured an application to be made for a division of the real estate, in the names of Joseph B. Stafford and wife; and that the real estate, not being susceptible of division, was subsequently sold by the commissioners for fifteen hundred and ninety-seven dollars: that this was for his own benefit, and not for the benefit of the complainant and her husband. He denies that the complainant ever executed to him any letter of attorney, or any writing represented as such.

In further answering, the defendant states, that the original deed, with the acknowledgment on it, was in his possession at the time of the commencement of this suit, and was then shown by him to Andrew Rowan, esquire, the commissioner who took

the acknowledgment; but that the same has since that time been, by some casualty, mislaid or lost, and cannot now be found.

After issue joined, a number of witnesses were examined by the parties respectively; and the testimony being closed, the cause was submitted to the court without argument.

*S. R. Hamilton*, for complainant;

*H. W. Green*, for defendant.

THE CHANCELLOR. If I rightly apprehend the case, there is but a single question involved in it, viz: whether the complainant, together with her husband, Joseph B. Stafford, did actually and in truth make a conveyance of all their interest in the estate of William Holmes, deceased, on or about the 25th day of November, 1824, and acknowledge the same before a competent authority, as is alleged by the defendant; or whether the instrument set up by the defendant, and purporting to be such conveyance, is false, forged, and counterfeited, as is charged by the complainant? How far fraud may have entered into the procurement of the instrument, or whether the consideration was bona fide, are questions not raised by the pleadings, and therefore not proper for the consideration of the court.

I propose to inquire, in the first place, what is the evidence to prove that there was actually a conveyance made by Joseph B. Stafford and wife to James B. Stafford, of the property now claimed. Unfortunately for all parties, the original instrument has been lost or mislaid, and cannot now be produced, and secondary evidence must be resorted to. That there was a paper once in existence, purporting to be a deed between the parties, is evident from the fact that it was recorded in the clerk's office of the county of Middlesex, in December, 1826.

It appears from a copy of the record, that the original was acknowledged before Andrew Rowan, esquire, one of the commissioners, &c. of the county. He has been examined as a witness on the part of the defendant, and states, under oath, that he recollects taking the acknowledgment of the grantors,

Joseph B. Stafford and Maria his wife. The deed was to James B. Stafford, and he understood it to convey the right of Maria the wife, to the place on which her father had lived. Mrs. Stafford was present, and he made known the contents of the deed to her. This took place shortly after their marriage, and while they lived at Allentown, with James B. Stafford the father. The acknowledgment was taken at the time the certificate bears date. He further states, that he saw the deed in the winter of 1830. The certificate of acknowledgment was then upon it, and he knew his hand-writing signed to the acknowledgment. It was shown to him by James B. Stafford, and he then read the deed over.

This witness was of the age of eighty-two years when he was examined in 1830, and consequently must have been seventy-six years old when the acknowledgment was taken. It was attempted to be shown on the part of the complainant, that he was not at that time competent to take an acknowledgment, and that he was quite unequal to the transaction of business at the time he was examined. The attempt was not successful. He is proved, by various witnesses, to have been a smart man for his years, especially as it regarded the powers of his mind. On this point, the testimony of John Drummond, Sarah Smith Stafford, James Cook, and especially of Robert Z. Purdy, is very satisfactory. Mr. Purdy says he has been acquainted with him for thirty years, and lived near him; he used to be almost daily in the store of witness: that he moved to Bloomsbury in March, 1831, and that, just before he moved, the deponent had a settlement with him. Their dealings were of considerable extent, and several years standing. The old gentleman was perfectly able to do business; as capable as ever he was, and as competent to take an acknowledgment as he was several years before. It appears by the testimony of Drummond, that even after he moved to Bloomsbury, he retained his mental faculties to a great degree, and was competent to do business.

The evidence of Andrew Rowan is corroborated by that of his daughter, Sarah Drummond; who states, that she recollects James B. Stafford calling at her father's house in January, 1830, and that he produced a deed from Joseph B. Stafford and wife to

James B. Stafford. She saw the deed, and read it over; she noticed the signature to the acknowledgment: it was her father's hand writing. She had seen him write frequently, and was familiar with the hand.

The defendant has proved further, by Catharine Ann Beck, that she was present at the signing of the deed at Allentown by Joseph B. Stafford and his wife. It was cold weather, she thinks December, and six or seven years ago, (1824 or 1825.) It was signed in Mr. Stafford's office, after candle-light, and the property mentioned in it was the Holmes property. Joseph B. Stafford and wife were living at the time at his father's. This testimony is corroborated by that of Sarah Smith Stafford, the daughter of the defendant, who states, that Joseph and his wife removed from her father's on the 14th December, 1824, and that she was present at the execution of the deed. It was in her father's office, at candle-light. It was the latter part of November, 1824. Andrew Rowan was in the office when the deed was signed. Catharine Ann Beck was there, and also Edward Parent, Sydney P. Burden and others.

The defendant then has shown, by two witnesses, that Joseph B. Stafford and the complainant executed a deed to James B. Stafford at Allentown, in the fall of 1824, in the evening; and that Judge Rowan was there that evening in the office. One of them states it to have been a deed for the Holmes property. He has produced a copy of a deed from the registry, agreeing in date and substance with the one described. He has shown by Judge Rowan that he at that time acknowledged such a deed; that the grantors were well known to him, and the contents of the deed were made known to the complainant before signing; that he has since seen the deed, and recognized his hand-writing to the acknowledgment; that the business was transacted at Allentown, before the complainant and her husband moved from his father's house.

This evidence, with the oath of the defendant, is satisfactory to show, that a deed was actually executed and acknowledged at the time and place alleged by the defendant in his answer; and it must prevail, unless the complainant shall be enabled to

overcome it by other and more weighty proof, or show that the defendant's witnesses are not worthy of credit.

The complainant has called the persons whose names appear in the copy of the instrument as subscribing witnesses; and from the situation in which they stand to the defendant, (other things being equal,) their declarations are certainly entitled to great weight. Sydney P. Burden says, that about four years previous to the time of his examination, that is to say, in 1830, he thinks in the month of August, James B. Stafford came one day in great haste for him to sign his name as a witness to a deed. He went to Stafford's office. Stafford said he wanted to send it to New-Brunswick next morning. Witness went and signed his name under the name of Edward Parent. There was no one there but James B. Stafford and himself. Stafford said it required two witnesses to get it recorded, and that it was a deed from Bloomfield and his wife; but did not state to whom given, nor for what property. He believes he has signed other papers for Mr. Stafford, but cannot recollect any particular one. Mr. Stafford told him, his son and wife wanted to have the deed recorded, and that he was to have the handling of it. He further states, that he put his name to the paper as a neighborly act, and did not know whether it was right or wrong, or that there would be any difficulty in witnessing a paper that he had not seen executed. He never saw Maria Stafford, the complainant, execute or acknowledge any paper.

This transaction cannot be the same one adverted to by the two female witnesses of the defendant. This was in 1826—that in 1824. The one was in August—the other in cold weather. One was before sunset—the other after candle-light. One was in the presence of witness and Stafford alone—the other in presence of a number of persons. Joseph B. Stafford and wife were present at the one, but not at the other. The witness does not say that this is the only paper he ever witnessed for Stafford. He says at one time that he believes he has witnessed others, but cannot recollect any particular paper so as to name it. Afterwards he states he has never witnessed any other deed or paper for him that he remembers.

Admitting all this to be true, I do not see how it is to impeach

the deed set up by the defendant. What paper it was that the witness signed, may be a subject for speculation: all the witness can say is, that it was a deed from Joseph B. Stafford and wife; but to whom given, or for what property, he cannot say. The complainant does not allege, that in 1826, she and her husband gave a deed, and therefore that the one in question is forged; on the contrary, she expressly denies having ever given any deed for the property. Nor does the complainant allege that the deed was palmed upon her as a power of attorney, or some other instrument, and her signature thereby fraudulently obtained. She insists that the deed set up by the defendant is a false deed, and that the names of the grantors and the witnesses are false and forged. This witness does not prove that fact. Nor is it made out by the other subscribing witness, Edward Parent. He says, he cannot remember that he ever saw Maria Stafford execute a deed for her father's property. He recollects signing one paper for James Stafford. It was at the house of Joseph B. Stafford, when he (Stafford) lived between Englishtown and Cranbury. The paper was represented to be a power of attorney; the witness did not see it executed. He has witnessed a number of papers for Mr. Stafford, both before and since. It is denied by the defendant that there was ever a power of attorney executed to him by the complainant and her husband. He states, that about the time the deed was given, his son executed a power of attorney to authorize him to collect from the executor of William Holmes, deceased, his wife's share of the personal estate; and that this was the only letter of attorney that was given. On the contrary, Samuel Craft, who was one of the commissioners appointed to divide, and afterwards to sell the land, states expressly, that James B. Stafford produced before the commissioners a letter of attorney, given by Joseph B. Stafford and wife to James B. Stafford and wife; and that at the time the commissioners were engaged in the performance of their duties, James B. Stafford and wife attended with them, under its authority. However much this may shake the confidence to be reposed in the defendant's answer, it does not materially affect the evidence bearing upon the main question. And if it be true that Parent did, at that time, witness a power of attorney, it does not necessarily follow

that he did not attest the deed, and that therefore it was a forgery.

There is certainly some mystery in the conduct of the defendant, about the division and sale of the land. He made application for a division in the names of Joseph B. Stafford and his wife, though they had no title. He declared that he acted in the matter as their agent. He was anxious that the property should be divided, and not sold; that the land might be kept for the grand-child; and in a letter to one of the commissioners, he finds fault with their proceedings, and says that Maria, the complainant, has never as yet had any thing out of the estate. The only explanation of which it appears susceptible, is, that it is not uncommon for purchasers of individual shares of real estate to apply for a division in the names of the original heirs, and act throughout rather as the attorney than the owner. In this instance, Mr. Stafford may not have cared to have it known, that he had an absolute conveyance of the whole property. His motive may have been impure; his conduct may have been fraudulent, and he may appear utterly unworthy of credit; he may have procured the conveyance by fraudulent misrepresentations, or the consideration may be altogether feigned; and yet the question whether the deed was actually given remain unaffected.

Taking the whole case together, there is reason to believe, a mistake exists somewhere; and it is to be hoped it is a mistake simply. It is not possible to reconcile all the evidence, or rather all the inferences deducible from it; but, taking it together, I am satisfied that the weight of evidence is very clearly with the defendant, and that such a deed as is set up by the defendant was actually executed by the complainant and her husband: how obtained, and for what purpose, it is not for me to inquire.

This is purely a matter of fact, and I should have preferred its trial in another mode; but as the amount in dispute is not large, and there are no serious difficulties on my mind as to the proper conclusion, I have not thought it advisable to put the parties to the expense of an issue.

Let the complainant's bill be dismissed, with costs.

CITED *in Note to Garwood* v. *Eldridge*, 1 *Gr. Ch.* 291.

JOHN YOULE AND CATHARINE HIS WIFE, v. SAMUEL RICHARDS ET AL.

The bill stated that the complainant, being seized of a tract of land, and indebted to defendant, executed a deed to him in fee simple for the premises, and delivered it to his agent, upon an understanding that complainant should have an opportunity to pay the debt in a given time, and that the agent should execute a written agreement to secure the right of redemption. That the agent executed and delivered to the complainant an agreement in writing, that if he should pay the debt within one year the deed should be void. This conveyance, when coupled with the agreement, is in equity nothing more than a mortgage; and the complainant is entitled to redeem on payment of the amount due.

Whenever it can be clearly shown to be the intention of parties that real estate, when conveyed, shall be subject to redemption, it is considered as a mere security, and can operate only as a mortgage.

The agreement, so far as it restricts the right of redemption to one year, is void. The right of redemption cannot be restricted to a limited time, or to a particular class of persons.

"Once a mortgage and always a mortgage," is an ancient equity maxim of approved policy and wisdom.

But a mortgagor, for good cause, may surrender his right of redemption, and render the title of the mortgagee absolute.

A mortgagee in possession may do no act to prejudice the estate. He is not authorized to cut down timber and commit waste upon the premises, even if the proceeds were applied to the extinguishment of the debt.

The bill charged, that the agreement for redemption was intrusted to a third person, and the agent of the defendant, by false representations, induced him to deliver it up, contrary to the wishes and without the knowledge of the complainant. If this be true, the complainant's equity would not be impaired, but he would be entitled to the aid of the court.

It was also charged that defendant was committing waste. An injunction was allowed.

The answer denied the fraud, and alleged that it was agreed between the agents of both parties, that the defendant should retain the land and pay the complainant a sum of money in full of his right of redemption, and the agreement should be given up and cancelled. That the agreement was given up, and the money paid on complainant's order to his agent, to receive it in full of the property. This, if done *bona fide*, is binding on the parties, and the title of the defendant is complete.

These allegations in the answer are not new matter, which, according to the practice, cannot avail the defendant; but directly responsive to a material allegation of the bill, and a complete answer to the charge of fraud—upon which ground the injunction was dissolved.

Youle et ux. v. Richards et al.

The defendant, in denying a charge against him, has a right to state the whole transaction.

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John Youle, one of the complainants, charges, that on the 20th January, 1824, he was seized in fee of a large tract of pine land, in the county of Burlington, valuable only for the timber growing upon it. That being indebted to Samuel Richards, of Philadelphia, in five hundred dollars, or thereabouts, Jesse Evans, the agent of Richards, proposed to him to execute to Richards a deed, conveying to him the property in fee, upon the understanding that the complainant should have an opportunity and right to pay the amount of the debt within a limited time, and that the agent would execute a written agreement by which the right of redemption would be secured. That the complainant acceded to the proposition, and accordingly executed a deed in fee to the defendant for the property, on the 27th February, 1824, and delivered it to the agent. That thereupon the agent executed an instrument of writing and delivered it to the complainant, wherein it was expressed, that if the complainant should pay the defendant, Richards, the said debt of five hundred dollars, or thereabouts, within one year, then the deed should be void, otherwise to remain in force. That being desirous to redeem the land, he entrusted to one William Wayne, his friend, the article of agreement, and requested him to tender the amount of the debt to Richards, and demand the deed. Wayne accordingly called before the expiration of the year, and tendered him the debt and interest, and demanded the delivery of the deed. Richards refused to deliver the deed without first seeing his agent, but told Wayne he would consider the tender a lawful one. That shortly after, the complainant called on Evans, the agent, and tendered him the amount due. He refused to receive it, and said it must be paid to Richards, though the complainant informed him at the time, that Richards was unwilling to receive it without first seeing his agent. That afterwards, viz. about the 1st of March, 1826, Richard Eayre, esquire, the brother-in-law of the complainant, at his request, called on Richards and tendered him the debt and interest; that he refused to receive it, and said the right of redemption was extinguished. That in

March, 1826, the said Jesse Evans called on William Wayne, and by divers misrepresentations induced him to deliver up the article of agreement; all which was without the knowledge of the complainant. That before the expiration of the time limited for the redemption, Richards took possession of the land, and committed, and still continues to commit, great waste, spoil and destruction.

The complainant, alleging his willingness to pay the money due, prayed an injunction to restrain the commission of further waste; and that the defendant might be compelled to re-convey the land to him on payment of the amount due, and to account for the rents and profits, as well as the damage to the property.

On filing the bill, an injunction issued to stay waste.

An answer having been put in by both defendants, it is moved to dissolve the injunction, on the ground that the equity of the bill is denied.

The motion was submitted without argument.

*Wall*, for the motion;

*Southard*, contra.

The Chancellor. The complainant has set out an equitable right. According to his statement, the conveyance, when coupled with the agreement, is, in equity, nothing more than a mortgage, and he is entitled to redeem on payment of the amount due. He alleges that he tendered the debt and interest, first to the principal, Richards, and then to Evans the agent, and that both tenders were made within the year. Richards declined receiving the money tendered without first seeing the agent; and the agent, when called on, declined receiving it, and said it must be paid to the principal. These facts are substantially admitted by the answer. Richards says he agreed to consider the tender lawful, so far as respected the amount due, but was unwilling to receive the money, or give any receipt for it, until he could hear from his agent. And Evans says, that shortly after this, but at what particular time he cannot recollect, the tender was

made to him, and that he declined receiving the money, because he had no authority to take it. So far forth the equity of the bill is admitted by the defendants. The answer alleges, it is true, that after the two several tenders made by the complainant, Evans, the agent, called upon the complainant to know if he still wished to redeem; that he appeared undecided, and promised to let him know in one week, which he failed to do; and that after the lapse of more than a month, Evans, as the agent of Richards, took possession of the property. Admitting these facts as stated, I do not see that they affect the complainant's equity, or that they gave the defendant a right to take possession of the property and use it as his own. The fact of possession cannot aid him, for he was not let in by the complainant.

The complainant is to be considered in this court in the light of a mortgagor. His situation is not altered by the fact that Richards (as stated in the answer) originally held a mortgage against him, and that upon an arrangement made between them, the complainant agreed to give him, and did actually execute and deliver to him, an absolute deed, on receiving an agreement in writing that he should be at liberty to redeem by paying the money due in one year. The conveyance could operate only as a mortgage in equity, and the agreement, so far as it restricts the right of redemption to one year, is void. The principle is well settled, that all such restrictions are void. Whenever it can be clearly shown to be the intention of the parties, that real estate, when conveyed, shall be subject to redemption, it is considered as a mere security; and the right of redemption cannot be confined to a limited time, or to a particular class of persons. In *Kilvington* v. *Gardner*, 1 *Vern.* 192, it was decreed, that although the condition of the mortgage was to redeem during the life of the mortgagor, the heir might redeem notwithstanding. In *Clinch* v. *Witherly*, *Cas. Temp. Finch*, 376, there was a surrender of a copyhold estate to the use of A. B., without any condition expressed in it, but a judgment was given at the same time as a further security; and it was agreed by a note in writing, that if the mortgagor should within a twelve-month pay back the consideration money of the surrender, that he would yield up the copyhold and acknowledge

satisfaction on the judgment. The court considered the surrender and judgment as securities only for the repayment of the money, and decreed a redemption sixteen years after the twelve months had expired. "Once a mortgage and always a mortgage," is an ancient equity maxim, of approved policy and wisdom. There would have been, without it, a door open for the imposition of every kind of restraint on the equity of redemption, and thereby the borrower, through necessity, would have been driven to embrace any terms, however unequal or cruel; which would have tended greatly to the furtherance of usury, and the conversion of the equitable jurisdiction of the court into an engine of fraud and oppression. In the chancery of New-York, it was held, that every contract for the security of a debt by the conveyance of real estate, is a mortgage; and all agreements of the parties tending to alter, in any subsequent event, the original nature of the mortgage, and prevent the equity of redemption, is void. If the conveyance is a mortgage in the beginning, the right of redemption is an independent incident, and cannot be restrained or clogged by agreements: *Henry* v. *Davis*, 7 *John. C. R.* 42. Such an agreement, says Fonblanque, would be contrary to natural justice in the creation of it, and prove a general mischief, because every lender would by this method make himself chancellor in his own case, and prevent the judgment of the court: 2 *Fonb.* 259. See also *Fry* v. *Porter*, 1 *Ch. Ca.* 141; *James* v. *Oades*, 2 *Vern.* 402; *Seton* v. *Slade*, 7 *Ves.* 273; and 1 *Pow. on Mortg.* 116, et seq.

Considering Richards, the defendant, as a mortgagee in possession, he is not authorized to cut down timber and commit waste upon the premises. No act prejudicial to the estate can be justified in equity. Even if the proceeds of the timber cut were appropriated to the extinguishment of the debt, it would be very questionable policy to allow the mortgagee to pay himself his debt out of the property, according to his own ideas of right: *Harson* v. *Derby*, 2 *Vern.* 392; *Farrant* v. *Lood*, 3 *Atk.* 686; 1 *Pow. on Mortg.* 188–9; *Eden on Inj.* 118.

Were there no other facts in the case, I should feel no difficulty in retaining the injunction until the hearing, on the ground that Richards is a mere mortgagee in possession, and therefore

not justified in committing waste on the property; but there is one circumstance in the case which materially varies the whole ground. It appears, according to the complainant's own showing, that the instrument of writing in the nature of a defeasance, which was given for the safety of the complainant, was delivered up to the defendant, Richards, and cancelled. This, if a *bona fide* transaction, is binding on the parties. A mortgagor may, for good cause, surrender his right of redemption, and render the mortgagee's title absolute. This is an every day transaction, and does in no wise impugn the principles already established. It is alleged, however, by the complainant, that this was a fraudulent transaction, and ought not to take away, or even to prejudice, his rights. He states that Evans, one of the defendants, knowing that the original article of agreement was entrusted to William Wayne, called on Wayne to effect a redemption of the land, and, by making divers false representations, induced him to deliver up the article: that this was contrary to the wishes of the complainant, and he was ignorant of it until some time afterwards. If this be true, the complainant's equity is not impaired, and he is entitled to the full aid of the court, not only to protect him in his rights, but to expose the fraud by which those rights are sought to be destroyed. I think, however, the answer of the defendants sufficiently repels the charge. It sets forth, that after the complainant neglected to redeem the land, the business remained unsettled, and that Richards referred it to Evans to make such arrangement with Wayne, who was entrusted with the agreement, and who was the brother-in-law of the complainant and acted as his attorney and agent in the matter, as he might think proper and right; and it was accordingly agreed between them, that Richards should retain the land, and pay to Youle the sum of two hundred and fifty dollars, in full of all his interest, right of redemption, or other claim therein; and that the agreement should be cancelled and delivered up. This arrangement was acceded to by Richards, and he agreed to pay the money to Wayne on his producing an order from Youle, the complainant, to receive the amount, and also the original agreement. That accordingly, on the 5th September, 1826, Wayne, acting on behalf of Youle,

produced the agreement, and also a written order from Youle, authorising Richards to pay to Wayne two hundred and fifty dollars, as the balance in full; whereupon he paid the money to Wayne, and took his receipt, stating it to be for lands near Martha furnace, purchased by Jesse Evans for Richards' account.

This appears to me a complete answer to the charge of fraud. And it is not new matter, which, according to the practice of the court and the reason of the thing, cannot avail the defendant on this motion. It is directly responsive to a material allegation of the bill. The defendant, in denying a charge against him, has a right to state the whole transaction.

In making this arrangement, it appears that Wayne undertook to act as the agent of Youle, the complainant; who now insists that Wayne was not authorised. But we are to take the defendant's answer as true, upon the present inquiry; and it shows, not only that Wayne acted as agent, and made the contract as such, but that the contract was not completed until he produced the written authority of Youle himself to receive the stipulated sum of money, and also produced the original agreement or defeasance to be cancelled. This could not have been done without the knowledge and approbation of the complainant.

As the case is presented upon the bill and answer, the title of the defendant is complete, and there is no ground for continuing the injunction.

Injunction dissolved.

CITED *in Crane* v. *Bonnell*, 1 *Gr. Ch.* 268; *Vanderhaize* v. *Hugues*, 2 *Beas.* 245; *Clark* v. *Condit*, 3 *C. E. Gr.* 362; *Merritt* v. *Brown*, 4 *C. E. Gr.* 289; *Crane* v. *DeCamp*, 6 *C. E. Gr.* 417.

SAMUEL LEGGETT AND JAMES A. BURTIS, THE PRESIDENT AND DIRECTORS OF THE FRANKLIN BANK OF THE CITY OF NEW-YORK, AND JAMES KENT, RECEIVER FOR SAID BANK, v. THE NEW-JERSEY MANUFACTURING AND BANKING COMPANY, AND JAMES VANDERPOOL, SAMUEL CASSEDY AND ARCHER GIFFORD, RECEIVERS, &c.

The powers of a corporation are, strictly speaking, two-fold; those that are derived from express grant, and those that are incident and necessarily appertain to it, whether expressed in the grant or not.

The power to make by-laws, to make and use a common seal, and the right to sue, are incident to every corporation.

In modern times, it has been usual to embrace all these incidental powers in the act of incorporation, so that it may now be considered a general rule, that the powers of a corporation are regulated and defined by the act which gives it existence.

A corporation is strictly limited to the exercise of the powers specifically conferred upon it; and the exercise of the corporate franchise cannot be extended beyond the letter and spirit of the act of incorporation.

Corporations, like natural persons, are bound by the acts and contracts of their agents, done and made within the scope of their authority.

The president and cashier of a bank, as such, have no power to execute, in the name and behalf of the corporation, a mortgage or conveyance of real estate.

What are the appropriate duties and powers of the president and cashier of a bank.

The appearance of a corporate seal to an instrument, is evidence that it was affixed by proper authority. A mortgage, signed by the president and cashier of a bank, and sealed with the corporate seal, is, *prima facie*, duly and lawfully executed.

But, while the common seal is held evidence of the assent and act of the corporation, the court may look beyond the seal, and inquire in what manner, and by what authority, it was affixed; and it may be shown that it was affixed without proper authority. The burden of proof is on the party objecting.

In the act incorporating *The New-Jersey Manufacturing and Banking Company*, the company are declared "capable in law of purchasing, holding and conveying, any estate, real or personal, for the use of the corporation." This right is afterwards modified, so that the real estate which it may hold shall be no more than is necessary for its accommodation in the transaction of business, or such as may be acquired upon sale or otherwise, for the purpose of securing debts due to the corporation. The banking house was necessary for the accommodation of the company in the transaction of its bu-

siness. It was lawfully held, and might be lawfully conveyed for the use of the corporation.

A mortgage is a conveyance; it is an alienation of the estate; and whether in payment of a debt, or as security, direct or collateral, it was for the use of the corporation, and might lawfully be given. In giving it, the company acted within their authority.

The charter of the New-Jersey Manufacturing and Banking Company also provides, "that all the affairs, property and concerns of the said corporation, shall be managed and conducted by eleven directors, who shall be elected annually; and that the directors for the time being, or a majority of them, shall have power to make and publish such by-laws, rules and regulations, as to them shall appear needful and proper, touching the government of the said corporation, the management and disposition of the stock, business and effects thereof, and all such others as may appertain to the concerns of said corporation." By this provision, the general power over the affairs of the corporation, was committed to the board of directors; and a mortgage executed under the authority of that board, would be valid.

But a mortgage signed by the president and cashier, with the corporate seal affixed by them, without the authority or concurrence of the board of directors, is not a valid instrument.

Where the board of directors appointed "*a finance committee*," with "a general authority in collecting and providing ways and means, and negotiating financial operations, and the power of discounting,"—the powers of this committee were purely financial: they had authority to discount and provide ways and means to carry on the ordinary operations of the bank, but had no right to mortgage real estate.

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The controversy in this case is between the receiver of the Franklin Bank of the city of New-York, and the receivers of the New-Jersey Manufacturing and Banking company, and grows out of a mortgage alleged to have been given by the last named corporation, to Samuel Leggett and James A. Burtis, in trust for the Franklin Bank. The mortgage, with the bond accompanying it, bears date on the 19th January, 1828, and is for the sum of ten thousand dollars. It conveys the banking-house and property at Hoboken. The bill is filed to foreclose the defendants' equity of redemption, and for a sale of the mortgaged premises. The receivers have answered. They admit the existence of the bond and mortgage, as set out in the bill; but allege by way of defence, that Aaron Ogden Dayton, the president, and William Munn, the cashier, who executed the mortgage, were not authorized or empowered by the directors, or by the act of incorporation, or in any other manner, to mortgage,

sell or convey the real estate of the bank; and that the corporate seal was affixed to the bond and mortgage, and the same were signed by the president and cashier, without the order or authority of the said Manufacturing and Banking company, and without any vote or resolve of the directors; and that the Franklin Bank had notice of the fact. They also deny that the bond and mortgage are the deeds of the corporation.

There are other matters set up in the answer, touching the operation of the bond and mortgage, in case they should be considered valid instruments, which it is not necessary here to mention.

*W. Pennington*, for the complainant. The bill in this case is filed to foreclose a mortgage, given by the New-Jersey Manufacturing and Banking company, (commonly called *The Hoboken Bank,)* to Leggett and Burtis, for the benefit of the Franklin Bank. A decree, *pro confesso*, was taken against the Hoboken Bank. But the receivers have put in an answer, which raises two questions:—Whether the bond and mortgage are valid instruments; and, if valid, whether the defendants are entitled to the benefit of certain deposits.

1. The president and cashier, and all the directors who have spoken to the point, declare, that the mortgage was necessary and proper. They say, it would have been ratified by the board if it had been presented to them. This relieves the case from all imputation of fraud. The board, it appears, seldom met. They appointed a *finance committee*, consisting of the president, the cashier, and one of the directors; who had charge of the affairs of the bank generally, and, some of the witnesses say, did all the business. The rule of corporations is, that a majority must govern; so it is where there is a committee. A majority of this commitee did assent to the mortgage. The president and cashier signed the bond and mortgage, and they affixed to it the corporate seal, which is the highest evidence of an act of the corporation.

But it is objected, that the president and cashier were not authorized to make the mortgage; that it was done without the order of the board of directors; and that this was known to Leg-

gett and the Franklin Bank. This position we deny. There is express evidence to the contrary. The subject came up in a negociation between Leggett and Dayton, the two presidents. The finance committee proposed to give a mortgage for ten thousand dollars. Some difficulty arose about the ratification of the board. Leggett said he would trust to a subsequent ratification; but on the 12th January, (a week before the execution of the mortgage,) Dayton wrote to Leggett that he would call a special meeting of the board with reference to that matter. After receiving this letter, Leggett had no farther conversation with Dayton until after he received the mortgage, (which was executed on the 19th January, 1828,) and he had a right to suppose that the measure had received the sanction of the board. Besides, the affidavit of the cashier, indorsed on the back of the mortgage, states, that it had received the sanction of the board. The fact that they kept no minutes, cannot help the company. When a man innocently receives a bond from a corporation, under the corporate seal, and signed by the proper officer, it is good against the corporation, especially when the corporation have received the benefit; and Leggett says the money was paid. The corporate seal itself, (though affixed by an officer *de facto*,) is evidence of the assent of the corporation: *Skin. R.* 2; 2 *Bac. Ab.* 15; 1 *Kyd on C.* 308 to 317.

2. If the mortgage is valid, the defendants say they are entitled to a reference, to ascertain the amount of a demand against the Franklin Bank for paper deposited, and lost for want of prosecution. We say not. When paper is left for collection, the Bank is bound to make demand, but not to prosecute. Again, the proceeding here is *in rem*. It admits of no offset, if the money was advanced on the mortgage, as we say it was. If it was given as a mere security for an existing demand, then there must be a reference; *Hop. R.* 270. We ask that the mortgage be declared valid, and that it be referred to a master to ascertain the amount due upon it.

*E. Van Arsdale, sen.*, for the defendants. The controversy is between the receivers of the two banks. No consideration passed from Leggett and Burtis, the mortgagees, to the Hoboken

Bank, at the time the mortgage was given. As to them, it is void for want of consideration. But there is evidence that the object was to secure an old debt to the Franklin Bank. The declaration of trust is, to liquidate the account of William Munn, the cashier of the Hoboken Bank. We insist,

1. That the corporation was not capable of making the mortgage. This depends upon their charter, to which we must give the proper construction. A corporation can act only in the manner prescribed by their charter. If they depart from this, they exceed their powers, and the act is void: 2 *Cranch*, 166; 2 *Dow P. C.* 523; 1 *Peters*, 71, 72; 2 *D. and E.* 171. By their charter, the New-Jersey Manufacturing and Banking company have a limited power, of purchasing, holding and conveying real estate, for certain purposes; but no power to mortgage; such a power is foreign to the objects of the institution. It is a bank. It is no part of banking business to mortgage real estate. The proper business of banking, is receiving money in deposit, discounting notes, buying and selling bills of exchange, &c.; and however convenient it might be to mortgage, at certain times or for certain purposes, yet no argument drawn from convenience can enlarge the powers of a corporation: 4 *Peters R.* 169.

2. But if the corporation have the power, we say the mortgage was not duly executed. The business and affairs of the corporation are, by the charter, to be managed by a board of eleven directors. The corporate seal was affixed without the authority of this board. The president says there was no previous order of the board; the cashier says there was none that he knows of; and a majority of the directors (who have been examined) say the same thing. We are in possession of the fact that there was no previous order. It is said, however, that if the directors afterwards confirmed it, it is sufficient. But no such confirmation appears. On the contrary, it is in evidence that there was no meeting of the board, from the date of the mortgage, (19th January, 1828,) to the 4th June following. The minutes of that day make no mention of the mortgage, and before that time the Franklin Bank had broke, and their property was in the hands of a receiver. We have therefore established the negative. But they rely on the affidavit of Munn, the cash-

ier, endorsed on the mortgage; which states, that it was approved by the board. This was indorsed five days after the date of the mortgage, and after it had been credited on the books of the Franklin Bank. The mortgage, therefore, was not taken on that ground. But this is no affidavit. It is not subscribed, or sworn before a proper officer. It amounts only to a declaration; and if the president and cashier had both declared, at the time of the delivery of the mortgage, that it was executed and the seal affixed by order of the board, it would not have been sufficient, because this was an act not within the scope of their general authority as president and cashier of the bank; and the corporation would not have been bound by it: 3 *Peters*, 305. There is, therefore, no evidence of any authority to execute the mortgage, or any confirmation of it; and affixing the seal to it, without authority, will not make it the act of the corporation: 12 *Mad.* 423; 2 *Ves. and B.* 226; 5 *John. C. R.* 364. Of this want of authority Leggett was aware, because, in the last interview between them, when Dayton expressed his doubts as to the power of the president and cashier to make the mortgage without the authority of the board, he answered, that if they would execute it he would take it. Nor can the complainants place themselves in the situation of bona fide purchasers without notice; as the Hoboken Bank have not had the benefit of the mortgage by way of loan; the object being merely to secure an old debt. The mortgage, too, was not duly proved to entitle it to registry: the proof was made not by the subscribing witnesses, in proper form, or before a proper officer. But if it is valid, we are entitled to a reference to ascertain the state of the accounts.

*I. H. Williamson*, in reply. The main question is, whether the mortgage is valid, as between the two banks: the receivers stand in no better situation than the banks they represent. I am surprised at the first position taken by the defendants' counsel; that the Hoboken Bank had no power to make the mortgage. Some powers are incident to every corporation, and especially corporations aggregate, without being expressed. Other powers may be considered as included in those expressly granted, or necessarily resulting from them. The bank is authorized by their char-

ter to purchase, hold and convey real estate. They are limited to such real estate as may be necessary for their accommodation in the transaction of their business, or such as may be acquired in a particular manner; but there is no restraint as to the disposition of it when lawfully acquired. It was lawful for them to purchase and hold the banking house. The power of alienation is incident to the power of purchasing and holding. It was therefore lawful for them to sell and convey their banking house. If they could sell and convey absolutely, why not mortgage it. A mortgage is a conveyance: it is an alienation; and being made for the benefit of the bank, it is valid. The case in 2 *D. and E.* 171, is not applicable: that was a case of trustees, and not of a corporation.

In the second place, it is said we have not proved the due execution of the mortgage. If it was not duly proved at the time of recording, it is sufficiently proved now; and if there has been no transfer, the mortgage is good nevertheless. It is not necessary to prove the signature of the president; it is sufficient to prove the common seal, and the affixing it to the instrument by the proper officer. Nor is it necessary to prove the prior assent of the corporation; that is implied and proved by the corporate seal. The seal is the highest evidence of the act of the corporation. If the seal was improperly put to the instrument; if it was put by a stranger, this matter must be shown by the corporation. The *onus probandi* is on them. But when the seal is put by the proper officer, who acts under a general authority, it is conclusive evidence of the assent of the corporation, and they are bound: *Kyd on C.* 267–8. Otherwise a corporation keeping no minutes, might commit great frauds. Here the company kept no regular minutes. They had no book of minutes. The minutes of June, 1828, was on a slip of paper only, in the handwriting of the president. How then is it proved that there was no order sanctioning the mortgage? But an order was unnecessary. Affixing the seal by the head of the corporation is sufficient. A deed entered into by the Dean, will bind the Chapter: 2 *Atk. R.* 45. The case from *Ves. and B.* does not apply.

The directors who have been examined, all say, it was necessary for the bank to give the mortgage. Nothing was wanting

but mere form. The mortgage was for banking purposes. It went to the use of the bank: they obtained a large credit by it, and have had the benefit of it. They ought to have affirmed or disaffirmed the transaction. Under such circumstances, a court of equity would have decreed a mortgage to be given: *Kyd C.* 312, 316.

But it is said that Leggett knew the president and cashier were not authorized to execute the mortgage. He thought it immaterial whether the approbation of the directors was prior or subsequent to the execution, and from Dayton's letter he had a right to presume that it had been obtained. We pray a decree for the amount due on the mortgage.

THE CHANCELLOR. Out of the matters of defence, as above stated, two questions have been raised. The first is, whether the New-Jersey Manufacturing and Banking company had any authority to give a mortgage on their property.

Upon this part of the case, I apprehend there can be no room for serious doubt. The powers of a corporation are, strictly speaking, two-fold: those derived from express grant, and those that are incident, and necessarily appertain to it, whether expressed in the grant or not. The power to make by-laws is incident, for a corporation must necessarily have laws to regulate its proceedings. Of the same character is the power to make and use a common seal; for the law anciently was, that a corporation could act and speak only by its common seal. The right to sue is also incident: 2 *Bac. Ab.* 15, *Corporations.* In more modern times it has been usual to embrace all these incidental powers and privileges in the act of incorporation; so that it may now be considered as a pretty general rule, that the powers of a corporation are regulated and defined by the act which gives it existence.

In the act incorporating the New-Jersey Manufacturing and Banking company, the company is declared capable in law of purchasing, holding and conveying any estate, real or personal, for the use of the corporation. This right is afterwards modified, so that the real estate which it may hold shall be no more than is necessary for its immediate accommodation in the transaction

of business, or such as it may have acquired by sale or otherwise for the purpose of securing any debt or debts due to the said corporation. All real estate thus held may be conveyed for the use of the corporation. The property embraced within the mortgage now in question, was the banking house and lot at Hoboken, where the bank was located according to the terms of the charter; and it was, in the words of the act, necessary for the immediate accommodation of the company in the transaction of their business. It was, then, lawfully held, and might be lawfully conveyed for the use of the corporation. A mortgage is a conveyance, or deed. It is an alienation of the estate, and there is no reason to doubt that this mortgage was made for the use of the corporation. Whether given in payment of a debt, or as security either direct or collateral, it is not important now to inquire. The question is, whether a mortgage could legally be given; and I think we need go no further than to the charter itself for a satisfactory answer.

The argument, that this company was incorporated for banking purposes, and that the legitimate objects of such a company are to discount paper, and deal in bills of exchange and promissory notes, and not in lands or real estate, is just. No bank should be allowed to speculate in real property. It is contrary to the spirit and design of such institutions, and is liable to abuse. It always results in injury, and sometimes in ruin. But the argument does not apply to this case. Here was no speculation in lands or houses. The property was necessary for the lawful purposes of the company, and held for those purposes. If the company saw fit to mortgage it, for their safety or the advancement of their interests, they acted within their authority, and having acted in good faith for the best interests of the institution, it is not for the receivers to come in and question the proceeding.

This view is an answer to the authorities cited by the counsel of the defendants on this branch of the case. They all go to the establishment of the principle, that corporations can act only in the manner prescribed by law, and that no argument drawn from convenience can enlarge their corporate powers. This doctrine is admitted in its fullest extent, and in this age of incorpo-

rations should be strictly adhered to. I concur in the opinion of the supreme court of the United States, as pronounced by justice M'Lean, in the case of *Beatty* v. *the Lessee of Knowler*, 4 *Pet. R.* 168, that a corporation is strictly limited to the exercise of the powers specifically conferred on it; and that the exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.

Considering that the banking company had power to make this mortgage, I proceed to inquire, in the next place, in what way it was executed, and whether the company are bound by it. It appears by the testimony, that the mortgage was signed by the president and cashier of the New-Jersey Manufacturing and Banking company, and that it was sealed with the corporate seal. This is, prima facie, a due and lawful execution of the instrument. The appearance of the common seal of a corporation to an instrument, is evidence that it was affixed by proper authority: *Skin. Rep.* 2; 1 *Kyd*, 268; *The President, Managers and Co. of the Berks and Dauphin Turnpike road* v. *Meyer*, 6 *Serg. and Rawl.* 12; *The Baptist Church* v. *Mulford*, 3 *Halst.* 183; *Angell and Ames on Corporations*, 115.

But while the common seal is held to be evidence of the assent and act of the corporation, it is not conclusive. It may, nevertheless, be shown that it was affixed without proper authority. The matter is susceptible of investigation. The burden of proof is thrown upon the objecting party; and he will be required to produce such evidence as shall be clear and satisfactory: *Mayor and Commonalty of Colchester* v. *Lowton*, 1 *Ves. and B.* 226. And in the case of *St. Mary's Church*, 7 *S. and Rawl.* 530, chief Justice Tilghman considers that the court has an undoubted right to look beyond the seal, and inquire in what manner, and by what authority, it was affixed. After supposing a number of cases in which great injury might arise from the adoption of a contrary principle, he adds, that in all these cases, it is too clear to admit of argument, that the court would do flagrant injustice, if it suffered the seal to preclude an examination of the truth.

In the case before us, it is alleged by the defendants, that the seal was affixed without authority, by the president and cashier. Believing this to be a matter that may properly be set up by these defendants, I propose to inquire in what way, by whom, and under what authority, the corporate seal was affixed. And for this purpose it will be necessary to look into the facts of the case.

The former president and cashier, and some of the former directors of the bank, have been examined as witnesses. They give a lamentable account of the mode in which things were managed in the institution. There was a board of directors appointed annually; but they paid little or no attention to the concerns of the bank. Some of them did not know of their appointment. They had no stated times of meeting for consultation or inquiry; and when they did meet, there was no record kept of their proceedings. For a time, the whole management of affairs was committed to the president and cashier; and the president says, the principal business was done by the cashier; in cases of difficulty, the president was consulted. In 1827, the board met twice. At one of these meetings they appointed a finance committee. This committee was in existence when the bond and mortgage were given. The bond and mortgage were signed, and the corporate seal affixed, by the president and cashier, without the concurrence of the board of directors. There was no assembling of the board for that purpose, and the question was never submitted to them. The company kept their accounts in New-York with the Franklin Bank. In the latter part of 1827, and the beginning of 1828, they were found to be considerably indebted to that bank, and were pressed by Mr. Leggett, the president, to give a mortgage. In January, 1828, he had an interview with Mr. Dayton, and renewed the request. Mr. Dayton expressed a perfect willingness to secure the Franklin Bank, but at the same time suggested a doubt whether a bond and mortgage given without the previous authority of the board, would be valid. An attempt was made to get a meeting of the directors, and it failed. At length, on the 19th of the month, the bond and mortgage were executed by the president and cashier, and the corporate seal affixed; after which the pa-

pers were delivered to Mr. Leggett, for the use of the Franklin Bank. This is a brief history of the principal facts connected with the transaction.

By the act incorporating the New-Jersey Manufacturing and Banking company, it is provided, that all the affairs, property and concerns of the corporation, shall be managed and conducted by eleven directors, who shall be elected annually; and that the directors for the time being, or a majority of them, shall have power to make and prescribe such by-laws, rules and regulations, as to them shall appear needful and proper, touching the government of the said corporation, the management and disposition of the stock, business and effects thereof, and all such other matters as may appertain to the concerns of said corporation.

From this it appears that the general power over the affairs of the corporation, was committed to the board of directors, to be chosen by the stockholders. If the mortgage had been executed under the authority of that board, it would, in the judgment of this court, have been valid. But the evidence shows it was not so executed. The board took no order or vote upon the subject; they have not consented, and many of them knew nothing of the transaction. If, then, the mortgage and bond could not legally be executed without the direct assent or order of the board, they cannot be valid instruments, even against the corporation, for such assent or order was never directly given.

But it is said that the seals were affixed to these instruments by the president and cashier, the openly acknowledged agents of the company; and if they have abused their trust, third persons ought not suffer by their misconduct.

This leads to the important inquiry, how far these incorporated companies are bound by the acts of their agents. Upon this subject, it was earnestly contended on the part of the complainants, that in this instance, the president and cashier being recognized as the agents and servants of the corporation, and being intrusted with the care of the corporate seal, their acts should bind the corporation, provided they were such acts as the corporation itself might lawfully do, or order to be done: that within this limit, strangers or third persons are not bound to inquire whether the mode of doing the acts was according to the internal

regulations of the company or not. There is much plausibility in the argument; and, considering that incorporations are fast spreading over the land, and mingling themselves with all the ordinary concerns of life, it may afford matter for profitable inquiry to those whose province it is to create these impersonal and artificial bodies. But the rule of law appears to be settled on this subject, and it is not for me to alter it. It is this: that corporations, like natural persons, are bound only by the acts and contracts of their agents, done and made within the scope of their authority: *Clark* v. *Corporation of Washington*, 12 *Wheat.* 40; *Bank of the U. S.* v. *Dandridge*, 12 *Wheat.* 64; *Essex Turnpike Corp.* v. *Collins*, 8 *Mass. Rep.* 299; *Angell and Ames on Corp.* 170. Thus, if a restricted authority is given to a special agent, a contract made by him without its limits, will impose no obligation on his constituent. Where one was appointod the agent of a turnpike corporation, to contract for making a certain portion of the road, with the restriction that one third of the payment on such contracts was to be made in shares in the road, it was held that a contract made by him without this stipulation would not bind the corporation: *Hayden et al.* v. *The Middlesex Turnpike Corporation*, 10 *Mass. Rep.* 403.

Taking this as the true principle, it is incumbent on the defendants to satisfy the court that the president and cashier acted beyond their authority.

They acted either as general or special agents; or in other words, either in virtue of their general power, *ex officio*, or of some special authority. If in virtue of their general power as officers of the bank, they exceeded it, in undertaking to convey the real property of the corporation. The cashier is usually intrusted with all the funds of a bank, in cash, notes, bills, &c., to be used from time to time for the purposes of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He draws checks, from time to time, for moneys, wherever the bank has deposits. In short, he is the executive officer through whom, and by whom, the whole moneyed operations of the bank, in paying or receiving debts, or discharging or transferring securities, are to be conducted: *Fleckner* v. *U. S.*

*Bank*, 8 *Wheat.* 360, 361; 12 *Ser. and Rawl.* 265. It is, perhaps, more difficult to define with precision the powers of the president of a bank; but I believe it may be said with safety, that they are not so important as those of the cashier. He is the president of the board of directors, but as such does not possess the powers of the board. He is a member of the board, and in the absence of that body is intrusted with the general supervision of the concerns of the bank.

I think it quite clear, that the president and cashier, as such, had no power to execute, in the name and in behalf of the corporation, the instruments in question. Their authority, although extensive, has limits. It may extend to all the ordinary, and even extraordinary financial operations of the company; but it can, by no presumption, be taken to include the right to execute a conveyance of real estate. This is a transaction of rare occurrence. It is not within the range of banking operations. It is the most solemn act that the corporation can perform; and it would be dangerous to the community, and to corporations themselves, if the president and cashier, the ordinary officers of the corporation, could exercise a right of this character, in virtue of the general powers of their office. Admitting that, in this instance, in consequence of the neglect or inattention of the board of directors, the duties of the officers were enlarged, and greater powers were committed to them, not expressly, but permissively, they would not be authorized to do an act of this kind. If they were even *general agents* for this corporation, without limit from common usage, or the prescribed by-laws of the company, they would not have been authorized to sell and convey the real estate of the company without express authority: *Stow* v. *Wyse*, 7 *Conn. Rep.* 219.

If, then, these officers had no authority, *ex officio*, to make the mortgage, had they any special authority? On this point, also, the defendants are bound to satisfy the court, at least so far as to overcome the presumption of law that now rests against them. The only legitimate source whence this authority could emanate, was the board of directors. It is manifest none had been derived from that source. There had been no meeting for that purpose. The matter had never been submitted to them.

The testimony of Mr. Dayton places this beyond a doubt. In his letter to Mr. Leggett of the 12th of January, 1828, he says, "Upon further reflection, we (meaning the cashier and himself) are decidedly of opinion that the previous authority of the board of directors should be obtained for carrying into effect so important an operation." Prior to that date, then, there was no authority from the board; and the same witness testifies that there was none afterwards, and before the execution of the mortgage. This appears to be conclusive upon this part of the case.

It was, however, contended by the counsel of complainant, that there was a finance committee appointed by a lawful meeting of the board; and that the giving of the mortgage was approved by them, or a majority of them, acting in behalf of the board. Without giving any opinion on the nature and extent of the powers that might lawfully be given to such a committee, I shall inquire into those that were actually given or intended to be given, and how far they were exerted in the transaction of this business.

Aaron Peck says, the committee of finance was appointed by a legal board, and had "a general authority in collecting, and providing ways and means, and regulating financial operations; they had also the power of discounting." Cyrus Jones testifies, that he was present when the finance committee was appointed. They were appointed to get the debts due from Barton and others settled up: they were to have the general care of the funds, and the power of discounting at Hoboken. In another part of his examination he says, great powers were given to the committee. Whether the power thus given, according to the recollection of either or both these witnesses, would warrant the committee in giving a mortgage on the banking property, was considered doubtful. Peck, who was one of the committee, thinks it would not. His idea is, that the committee would have had the right to make the contract, but that it should have been sanctioned by the board; and that they were not legally competent to mortgage the bank, without the approbation of the directors.

The powers of this committee were purely financial. They had authority to discount and to provide ways and means to car-

ry on the ordinary operations of the bank; but they had no right, as I conceive, to mortgage the real property. But let us look a little further, and see who composed this committee, and whether the giving of the mortgage was actually sanctioned by them. Peck says that the president and himself were two, and he thinks that John H. Hill, the cashier of the Franklin Bank, was the third; but of this he is not positive. He states further, as his impression, that he and Mr. Dayton approved of them; but states nothing about any consultation with Hill. Mr. Dayton in his testimony, makes no mention of this finance committee.

How, then, stands the case on this point. The appointment of the committee is proved. Who composed the committee is a matter of some doubt; whether a majority of the committee approved of the mortgage is also doubtful; and there is no evidence of any consultation with Hill, if he was in truth a member. To all these matters of difficulty is to be added, the more serious one, that the powers of the committee were insufficient to authorize the proceeding.

The defendants have, then, shown satisfactorily, that the president and cashier of the New-Jersey Manfacturing and Banking company, were not authorized by any previous vote or order of the board to affix the corporate seal to those instruments; that they had no authority to do it in virtue of their offices, or of the direction or approbation of any other lawfully authorized agents of the board. From all which, I am drawn to the conclusion that the bond and mortgage were not lawfully or properly executed by those officers. In coming to this conclusion, I wish to be understood in a legal sense, and not as impeaching the morality of the transaction. There is every reason to believe the mortgage was given in good faith.

If the view taken of this case be correct, the bond and mortgage were not, at the time of their execution, available as against the corporation. Still, they were not void in themselves. A corporation may approve of the unauthorized acts of its agents, and make them their own. This may be done directly or indirectly. It may be shown by express acknowledgment or act, or it may be inferred from circumstances. "By the whole course of decisions in this country, corporations, in their contracts, are

placed upon the same footing with natural persons, open to the same implications, and receiving the benefit of the same presumptions:" *Angell and Ames*, 132; *Bank of Columbia* v. *Patterson*, 7 *Cranch*, 306; *Randall* v. *Van Veghten and al.* 19 *John.* 65; *Bank of Alexandria* v. *Seton*, 1 *Pet.* 299.

It remains, then, to inquire, whether the New-Jersey Manufacturing and Banking company, acting through their lawfully authorized agents in that behalf, did in any manner or way ratify or sanction this act of the president and cashier.

Upon this subject there is but little evidence. There was no meeting of the board until June, 1828; at which time the Franklin Bank had closed its doors, and its effects were in the hands of a receiver. There is a written minute of the proceedings of that meeting, in the hand-writing of the president. It contains nothing in relation to this bond and mortgage. There was no act done at that meeting, so far as can be ascertained, which can be construed into a ratification. There were present, originally, A. O. Dayton, Paul Tucker, Aaron Peck, Joseph A. Halsey, Abraham Winans, and Cyrus Jones. Three new directors were afterwards chosen to fill vacancies, and took their seats; but there is nothing in the evidence to lead to the belief that the subject of the bond and mortgage was brought before the board, or that it came in any way under their notice, or was even made the subject matter of conversation. On the contrary, Cyrus Jones, who was present at the meeting, expressly says, that he never heard of the bond and mortgage until within a year from the time of his examination, which was in September, 1831. And Joseph A. Halsey, who was also present, says, he never heard of them until he heard of the controversy about them. It is evident, then, that the instruments were not confirmed at that meeting. The board consisted of thirteen members. A majority of those who constituted the board in 1827–8, have been examined, and no one of them proves any act of confirmation by the board. Four of them testify that they never heard of the bond and mortgage until a long time after they were given.

There are instances where a board of directors may bind themselves, or accept of a contract, by a tacit and implied assent:

12 *Wheat.* 83, *Bank U. S.* v. *Dandridge.* These cases rest upon the obvious principle, that the law will not sanction the fraud of a corporation, sooner than that of an individual. There must be something that will amount to legal fraud. Is there any thing of that character shown in this case? What approaches nearest to it, perhaps, is the fact disclosed by the testimony of Aaron Peck, that he conversed with different directors at different times, and the giving of the bond and mortgage was approved of generally. This brings home a knowledge of the fact to some of the directors; but to whom, or how many, is not shown. The time when, whether before or after the meeting of June, 1828, is uncertain. Whether the information was communicated to a majority of the board, is not ascertained. If the fact was known to some of the individual members of the board, and not disclosed to the board itself, shall it be taken as the implied assent of the board, so as to fix upon the corporation the charge of fraud, and on that ground bind them to an unauthorized contract? And if it be true, as is alleged, that the bank, by giving these securities, obtained a large credit with the Franklin Bank, is it shown that this fact was in any wise known to the directors? There is no kind of evidence of it, nor is there any thing, so far as I can discover, from which such knowledge can be fairly inferred.

According to my opinion, then, there is no evidence of any subsequent ratification or assent, either express or implied.

It is said, however, that the corporation, by means of the mortgage and bond, came into possession of considerable funds which were appropriated to their use, and that they are bound in equity by the contract on that ground. If I understand the way in which the business was transacted, it was this:—In January, 1828, the New-Jersey Manufacturing and Banking company were largely indebted to the Franklin Bank; and, upon giving these securities, the Franklin Bank gave them a credit on the account for so much money paid; in consequence of which they were enabled to obtain further loans from the Franklin Bank. The securities were intended to operate as a payment. There was no money borrowed on the faith of them directly. Some of the old authorities seem to favor the position of

the counsel on this point. Thus it is said, in an ancient case, that if the head of a corporation, by the intervention of a servant, buy certain things for the use of the corporation, which are actually applied to their use, they are bound by this contract; and an action may be maintained against them, after the change of the head, in whose time the purchase was made. So, if one who is the regular servant of the corporation, make a purchase, and apply it to the use of the corporation, it would seem that the corporation is bound: but in both these cases the plaintiff must aver that the things purchased came to the use of the corporation: *Long* 5to. *E.* 4, 70, 71; 1 *Kyd*, 314. And in *Wood's Civil Law*, it is laid down from the Digest, that corporations may borrow money by their syndick; but if he borrows more than he had authority for, the community is not answerable for it unless the money came to their use: *Wood's Civil Law*, 135; *Dig.* 12, 1, 27. When these cases are examined, they do not sustain the complainant. They do not go on the ground that the unauthorized contract of the agent binds the principal, but rest on the plain equity resulting from the use and enjoyment of the property. That equity applied to the present case, would not establish the securities now in question. It might, I do not mean to say it would, give the Franklin Bank the right to demand, in the character of ordinary creditors, the amount of the debt intended to be paid or secured by the mortgage. The security may be void, and yet the debt recoverable. See *Utica Insurance Co.* v. *Scott*, 19 *John.* 1. This question is not raised by the pleadings in this cause, and I give no opinion upon it.

The result of the whole case is, that those securities are invalid instruments, and cannot be enforced in this court against the defendants.

Much was said in the argument about the hardship of a decree declaring this bond and mortgage invalid, and about the innocence of Leggett. There is no room for complaint on the ground of severity. The transaction was, to say the least of it, incautious and unadvised; and if persons will deal in matters of the most solemn character, with agents who undertake to act out of the scope of their ordinary and acknowledged powers, they

must abide the consequences. Then, as to the innocence of Mr. Leggett: he believed, as he says in his examination, that the assent of the board to the giving of the mortgage had been obtained. I am bound to give credit to his testimony. I may, however, be permitted to say, that he founded his belief upon supposition rather than fact, and that he took no means to ascertain whether it was right or wrong. Mr. Dayton had previously expressed his opinion to Mr. Leggett, that the president and cashier had no authority to make the mortgage. Mr. L. differed in opinion, and signified his willingness to take it without the order of the board. Mr. Dayton said he would convene the board. Whether that had been done, and whether the board had made the order, were matters about which Mr. Leggett could have satisfied himself by a single question. He neglected or omitted to ask the question, and betrayed throughout an unusual anxiety to have the business completed. He does not allege that he was deceived by the affidavit of Munn, the cashier, on the back of the mortgage; nor could he have been, for that appears not to have been made till afterwards. If Mr. Leggett was innocent, he was certainly neither careful nor prudent in the transaction; and I cannot consider him as standing in a situation that entitles him, or the bank, to the favorable consideration of the court.

Let the bill be dismissed.

CITED *in State* v. *Mayor of Morristown*, 4 *Vr.* 63; *State* v. *Jersey City*, 5 *Vr.* 430; *Hudson* v. *Inhabitants of Winslow*, 6 *Vr.* 443; *Manhattan Mfg. Co.* v. *N. J. Stock Yd. Co.*, 8 *C. E. Gr.* 167.

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JAMES MURPHY v. JOHN STULTS—ON ORIGINAL BILL.

JOHN STULTS v. JAMES MURPHY, AARON LONGSTREET, AND JOHN RULE—ON CROSS-BILL.

Upon hearing, on bill, cross-bill, answers and depositions, where both causes came on to be heard together; and each party has material allegations to sustain under their respective bills; the complainant in the original bill is entitled to the opening and reply.

The original bill was filed by Murphy against Stults, to stay waste on a tract of land, which the complainant alleged he had

recently purchased of Aaron Longstreet, through his agent, John Rule, of which the defendant had taken possession, &c. The answer alleged that the defendant had entered into a prior contract with Longstreet for the purchase of the same premises, of which the complainant had notice; under which contract the defendant had taken possession, &c.

The cross-bill was filed by Stults against Murphy, Longstreet, and Rule, praying for a specific performance of the contract of sale by Longstreet to Stults, and for an injunction to restrain Murphy from committing waste, &c.

Answers had been put in, witnesses examined, and both causes set down for hearing; upon which, a question arose as to the order of proceeding.

*W. Halsted*, for complainant on original bill;

*S. R. Hamilton*, for complainant on cross-bill.

THE CHANCELLOR. A bill and cross-bill have been filed, to which answers have been put in, and the causes put at issue. Witnesses have been examined, and both causes now come on to be heard together. Each party has material allegations to sustain under their respective bills. In such case, the complainant in the original bill is entitled to the opening and reply.

# CASES DECIDED

IN THE

# COURT OF CHANCERY

OF THE

## STATE OF NEW-JERSEY,

JULY TERM, 1832.

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GARRET S. HENDRICKSON, WILLIAM G. HENDRICKSON, PETER S. HENDRICKSON, LAWRENCE THOMAS, WILLIAM HENDRICKSON AND ALICE HIS WIFE, AND SAMUEL POTTER AND REBECCA HIS WIFE, v. JAMES IVINS.

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Upon an agreement for the sale of land, of which a memorandum in writing was made as follows:—"January, 17, 1829. This may certify that James Ivins has agreed with the heirs of Samuel Hendrickson, deceased, for the farm where Garret Hendrickson now lives, and the said James Ivins is to give them forty-eight dollars per acre for the same." Although not noticed in the agreement, it may be shown by parol evidence, that it was mentioned at the time of the agreement, and admitted by the vendee in an after-conversation, that the green grain then growing in the ground, and some wild cherry logs, were reserved in the sale: and this part of the agreement is not within the statute of frauds, and will be enforced in equity.

And where the agreement existed, without any alteration in this respect, up to the time of executing the deed; and the scrivener who prepared the deed, being requested by one of the vendors to insert the reservation in it, declined doing so; not because it was objected to on the part of the vendee, but because he considered it unusual, if not improper, to insert such reservation in a deed in fee simple; and the deed was executed without it. Whether it be considered a mistake in the scrivener in not inserting it, or inadvertence in the vendors in not insisting upon its insertion, is immaterial; the mistake in the deed will be rectified, so as to accord with the agreement of the parties.

The idea which formerly prevailed, that *mistakes* could not be relieved against,

though cases of *fraud* might, has long been considered unsound; and certainly is not, at this day, the law of this court.

So, too, the principle which formerly obtained, that although a *defendant* might avail himself of a plain mistake, and thereby relieve himself from the operation of a written agreement; yet the *complainant* was not entitled to the same assistance to enable him to recover, has been repeatedly overruled; and the late cases go far to place both parties on the same footing.

Courts of equity now go on the broad principle, that where a mistake is manifest, they will, in the exercise of their ordinary jurisdiction, correct it, and hold the party according to his original intention.

Whether there is a custom of the country, that when a party is entitled to the way-going crop he can take the grain only, and not the straw, or if he take the straw away he must return it; established in such a way as to justify this court in acting on it, where there is no written contract, *quere.*

But in the case of vendor and purchaser, the contract itself must govern; and must be construed according to its own terms, and not according to the customs or usages between landlord and tenant, in respect to the way-going crop.

Under a reservation, in a contract for the sale of lands, of green grain in the ground, the whole crop goes together and is reserved; under the term *green grain in the ground*, it is, *quo ad hoc*, an entirety, and cannot be separated into its component parts; and being reserved, it is as though the vendee had purchased the land without any such grain being in the ground, and he has no interest in it whatever.

Under such circumstances, the vendee was properly enjoined from prosecuting a suit against the vendors, for taking the grain and straw; and the injunction was continued.

The principal ground of defence, i. e. the construction of the contract, not being unconscientious, no costs were given.

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The original bill in this cause was for an injunction, and presents the following case:—

That in 1815, Samuel Hendrickson, of Monmouth county, died intestate, leaving children, viz: Peter, Samuel, Tobias, Garret, Rebecca afterwards wife of Samuel Potter, and Alice afterwards wife of William Hendrickson. Peter sold out his interest in the real estate descended to them, to the other heirs. In 1829, Garret, Rebecca, and Alice, occupied the premises, paying the other heirs rent therefor according to their respective interests therein. In the autumn of 1828, Garret and Alice caused a crop of rye to be put in on thirty-five acres of the premises, which they insist they were authorized to cut and appropriate to their own use when at maturity. In January, 1829,

the said heirs agreed with James Ivins, the defendant, to sell him the said real estate for forty-eight dollars per acre; and on the 17th January, 1829, a short and imperfect memorandum of the agreement was made, which was afterwards departed from, and a new verbal agreement for said sale was made between the parties, in which it was expressly stipulated, that the grain growing on the premises should be reserved, and certain wild cherry trees were also expressly reserved.

On the 4th of April, 1829, a deed was executed, conveying to Ivins the property, in which deed no mention was made of the grain being reserved. This was through mistake and inadvertence, and because it was not customary, in conveyances in fee simple, to make mention of such circumstances.

In July, 1829, Garret Hendrickson caused the said rye to be cut and carried away, for the use of himself and sisters, being the lessees as aforesaid; and that William Hendrickson, Peter Hendrickson, and one Lawrence Thomas assisted, acting under him. Upon this Ivins brought suit against Garret, William and Peter Hendrickson, and Lawrence Thomas, in the common pleas of Monmouth; and this bill was filed for an injunction and relief. It prays that the grain may be decreed to belong to the said Garret, and to Alice and Rebecca and their husbands, and that the mistake in the deed may be rectified so as to exclude the grain from its operation. On filing this bill an injunction was issued, staying further proceedings at law.

The defendant, in his answer, admits that Samuel Hendrickson died seized, and left children, as above stated: that in 1829, the premises were occupied by Garret, Rebecca and Alice, as above set forth; but cannot state the terms of such occupancy. He admits, that in the autumn of 1828, they caused a crop of rye to be sown on the premises, on about forty-one acres of it, and not thirty-five, as stated by the complainants. That on the 17th of January, 1829, defendant entered into an agreement with the heirs for the purchase of the farm, at forty-eight dollars per acre; and that a memorandum of said agreement was made and signed by defendant and the heirs, in the following form: "January 17th, 1829. This may certify, that James Ivins has agreed with the heirs of Samuel Hendrickson, deceased, for their farm

where Garret Hendrickson now lives; and the said James Ivins is to give them forty-eight dollars per acre for the farm." He denies that the agreement contained any reservation of the grain, or that the said agreement was ever departed from, or any verbal reservation made respecting the grain. He alleges, that a few days after the agreement was made, Garret, Rebecca, and Alice and her husband, called on defendant, and said they had concluded not to sell the farm; but that neither Samuel nor Tobias made any effort to rescind the contract. A few days after, the objections were withdrawn. That after the said agreement was fully made, Samuel said there were a few wild cherry tree logs lying on the premises that they wanted for furniture, and there was also the rye growing on the ground. That thereupon the defendant declared, that if they would let him into possession of the premises peaceably and without diminution, he would not object to their taking the logs and the grain, leaving the straw. He has no recollection of any other agreement or reservation. The defendant admits the execution of the deed, and insists that at the time of the delivery, (in April,) there was no reservation or exception whatever, and that the whole of the property, with the rents and profits thereof, belong to the defendant. He denies any other reservation than that above stated, which he says was a mere benevolence, and without consideration, and formed no part of the contract; and denies that they let him into possession peaceably and without diminution, but that they took off the premises several loads of ashes, cut down four large wild cherry trees useful for shade, carried off a white oak log, and claimed and attempted to remove several other articles. He was still willing they should take the rye, provided they would thresh it on the premises and leave the straw, according to the license he had formerly given conditionally for the purpose; but they refused to act under such license, and set up a claim of right not only to the grain, but the straw. The defendant then sets up the statute for the prevention of frauds and perjuries, in bar of any parol agreement respecting the premises; and admits that when the complainants had entered and carried away the grain and straw, after being warned not to do so, he brought suit against them in the common pleas of Monmouth, as lawfully he might.

*G. Wood*, for complainants;

*G. D. Wall*, for defendant.

THE CHANCELLOR. Much testimony has been taken on both sides; and I think, on a careful review of it, there can be no doubt that, by the original agreement, entered into on the 17th January, 1829, the green grain then growing in the ground was reserved out of the purchase; and that, in what is called the second bargain, which was subsequently made, after certain difficulties on the part of some of the heirs had been removed, the same reservation was continued and confirmed.

Samuel S. Hendrickson testifies, that he was present when the agreement for sale took place; and that he informed defendant then that the grain belonged to Garret and his sisters, and must be reserved; and that the defendant agreed to it. There was nothing said about straw, but he considered the grain in the ground as embracing the grain and the straw, or considered them as one thing. After this some of the heirs became dissatisfied, and attempted to rescind the contract. Finally they all agreed to the sale, and witness again mentioned to defendant that the grain must be reserved, to which the defendant agreed.

Tobias S. Hendrickson was also present, and says the green grain in the ground was reserved. Samuel mentioned it, and the defendant consented to it; he said, "of course, he did not expect to have that."

These two witnesses swear expressly as to the fact and time of the transaction; and their testimony, from the circumstance of their being interested in the sale, and having their attention drawn to what took place at the time, and yet in no way interested in this question, is entitled to great consideration.

In addition to this, Gilbert Hendrickson testifies, that after the defendant went into possession of the property, he asked of him permission to get some black oak logs off the premises, which he had purchased off the former owners; he refused permission, and said they were not reserved, that only the grain in the ground and the cherry tree logs were reserved. He states further, that when the grain was being cut, defendant came to him

to know his opinion, whether he (the defendant) was entitled to the straw. He claimed it then as a custom, but said nothing about any agreement relating to it. This is in all things confirmed by the evidence of Ida Ann Molatt, who was present when the conversation took place.

There are some of the defendant's witnesses who speak of a conversation between the defendant and Garret or William in relation to the grain, and who understood the parties to say there was no other agreement but the short memorandum in writing, which was placed in the hands of John Taylor, jun., for safe keeping. Others understood them to refer to some subsequent agreement for taking the grain and some cherry tree logs, not in the nature of a reservation, but rather of a conditional permission, given *ex gratia*, and not founded on any consideration. But, notwithstanding these apparent discrepancies, I am satisfied that the conclusion to which I have arrived is correct. Casual conversations are but little to be relied on, especially when detailed after a lapse of time, by persons who had no particular interest in them when they occurred, and no special motive for treasuring them up in the memory. Some of the defendant's evidence on this point of the case is of this character; and making for it the allowance that is always due to such testimony, it is not difficult to reconcile it with the truth of the case.

But the agreement was entered into in January, and the deed, which is alleged to be contrary to the agreement and to have been drawn so by mistake or inadvertence, was executed in April. An important question is, did the agreement continue until the time the deed was executed, or was it altered? It must appear that the agreement was in existence, unrevoked, at the time of making the deed, or the fact of the mistake is not made out. It is not expressly shown from the evidence, that there was, when the deed was executed, any express recognition of the previous agreement. The conversation that passed between Hendrickson and Debow the scrivener, respecting the insertion of the reservation in the deed, was not in the presence of Ivins, and is no evidence against him. I think, however, the whole evidence shows there had not been, up to the time the deed was executed, any alteration of the original agreement, and that none was then

made. As it was before, so it existed at that time; and the deed as drawn, with full covenants and without any reservation, was not in conformity with the understanding of the parties.

The deed was prepared by Debow. He was requested by one of the vendors to insert the reservation in it. He declined doing it, not because it was objected to on the part of the defendant, but because he considered it unusual, if not improper. These reservations, he said, were never made in fee simple conveyances. This satisfactorily explains why the reservation was not made in the deed; and whether it is considered a mistake on the part of the scrivener in not inserting it, or an inadvertence on the part of the vendors in not insisting on its being done, is not at all material.

The agreement, then, being established, and it being also made manifest that the deed was drawn in its present form through mistake or inadvertence, and that it is not in accordance with the agreement of the parties, the question arises, whether this court can or will correct the mistake? and upon this point I cannot entertain a doubt. The idea which formerly prevailed, that *mistakes* could not be relieved against, though cases of *fraud* might, has long been considered unsound, and certainly is not at this day the law of this court. So, too, the principle which formerly obtained, that although a defendant might avail himself of a plain mistake, and thereby be relieved from the operation of a written agreement, yet the complainant was not entitled to the same assistance to enable him to recover, has been repeatedly overruled; and the late cases go far to place both parties on the same footing. Courts of equity go now on the broad principle, that where a mistake is manifest, they will, in the exercise of their ordinary jurisdiction, correct it, and hold the party according to his original intention. And upon this principle, I have no difficulty in ordering the mistake in this case to be rectified.

I will only refer to a few of the leading English cases on this subject: *Wordale* v. *Halfpenny*, 2 *P. Wms. R.* 151; *Heneage* v. *Hunloke*, 2 *Atk. R.* 456; *Simpson* v. *Vaughan*, 2 *Atk. R.* 31; *Henkle* v. *Royal Exchange Assurance Co.*, 1 *Ves. sen.* 317; *Baker* v. *Paine*, 1 *Ves. jr.* 456; *Burn* v. *Burn*, 3 *Ves.*

*jr.* 573. In this last case, a joint bond was held by lord Rosslyn to be a several bond, even against creditors; and the mistake was shown on the part of the complainant. So also, in the case of the *South Sea Co.* v. *D'Oliffe*, cited 5 *Ves. jr.* 601, the party was relieved against a mistake in the bond given by way of security, six months having been inserted instead of two months. Many other cases might be named. See those collected in 2 *Bridg. Index, tit. Mistake; Sug. on Vendors*, 120; and *Jeremy on Eq. Jurisd.* 432, 456, 489, 490.

Chancellor Kent, in *Wiser* v. *Blackly*, 1 *John. C. R.* 601, recognizes the same principle; and also in *Gillespie* v. *Moor*, 2 *John. C. R.* 585.

The question has several times been raised in this court, and I believe the decisions have always been uniform. In the case of *Smith* v. *Allen and al.*, decided in the term of July, 1830, the court rectified a mistake in a bond, taken by a sheriff for the prison limits, under the statute; and that, too, on the application of the complainant. In that case all the authorities are collected. I have examined the opinion then pronounced, in reference to this subject, and am satisfied of its correctness.

Taking the law to be settled on this point, I shall consider the deed reformed, and proceed to inquire into the construction to be given it. Shall it be construed as giving to the party reserving the green grain in the ground, the right to carry off the premises the straw, when the crop shall have arrived at maturity, or must the straw be left on the ground?

Much evidence has been adduced to prove what is the custom of the country in relation to the way-going crops. It has been sought to establish the principle, that when a party is entitled to a way-going crop, he can take the grain only, and not the straw; or if he take the straw away he must return it. I doubt whether any custom has been established in such a way as to justify the court in acting on it. Most of the cases referred to by the witnesses, were cases of holding under written contracts, in which it was stipulated that no hay or straw should be removed from the premises; and only prove that the generality of specific agreements are made in that way, but do not determine what the custom is when there is *no* contract. Some of the cases are

directly in point, and are entitled to a respectful consideration. It does not appear to me, however, if the custom was fully proved, that it would govern this case. There is no relationship of landlord and tenant existing between these parties. As between them, the crop cannot be viewed in the light of a way-going crop. As between the heirs themselves, some of whom were lessors and others lessees of this property, the custom, if proved, might apply.

In this case, the contract itself must govern; and it is to be construed according to its own terms, and not according to the customs or usages which may exist between landlords and tenants. It appears to me the contract admits of but one construction; and that is, that the whole of the crop, grain and straw, goes together, under the term *green grain in the ground.* It is, *quo ad hoc,* an entirety, and cannot be separated into its component parts. The green grain in the ground being reserved, it is as though the defendant had purchased the property without any such green grain being in the ground. It must be separated from the purchase, and taken as though it had no existence. It has none as to the purchaser, for he has no interest in it whatever.

I consider, therefore, that under the contract itself, the vendors were entitled to the crop in its largest sense; that they were justified in taking it as they did; and that the defendant be perpetually injoined from further prosecuting his suit in the common pleas.

I doubt the propriety of costs in this case, more especially as the defence on the principal ground, the construction of the contract or reservation, does not appear unconscientious. If costs are claimed by the complainant, I will hear him in behalf of the application.

Cited *in Bloom* v. *Welsh,* 3 *Dutch.* 179; *Martin* v. *Righter,* 2 *Stock.* 516; *Firmstone* v. *DeCamp,* 2 *C. E. Gr.* 315.

## JACOB PRICHETT v. THE EXECUTORS OF DANIEL NEWBOLD, DECEASED, AND OTHERS.

The assignee of an insolvent debtor, on general principles, is bound to pay all debts due and owing by the insolvent, up to the time of his making application for a discharge under the insolvent acts.

Upon a bill filed by J. Prichett, who was appointed the assignee of S. Hewlings, an insolvent debtor, upon his discharge under the insolvent act, on the 9th August, 1814, against D. Newbold and two others, to whom the debtor had, on the 17th December, 1811, assigned all his property, in trust, to satisfy claims due to them, and the balance to his own use; to set aside the former assignment, and for an account: It was referred to a master, to ascertain the sums due the former assignees, respectively, at the date of the first assignment, and the amount come to their hands. The master, among other things, reported, "that at the date of the former assignment, (17th December, 1811,) there was due to D. Newbold, one of the assignees, thirty-nine dollars and twenty-four cents; which report was confirmed, (in October, 1828,) and it was decreed, that the original assignment (to Newbold and others) was fraudulent and void; that the said assignees pay over the moneys by them received, and deliver the books and property in their hands, to the complainant; and that after deducting his expenses in prosecuting the suit, and a compensation for his time, trouble, &c., to be taxed by a master, he make a dividend of the balance among the creditors of the insolvent, agreeably to the statute concerning insolvent debtors. Also, that the original assignees receive a dividend, as creditors, for the amount found due to them, respectively, by the master's report." Upon a further reference, to inquire what sums were due to the creditors who had presented their claims to the complainant, agreeably to the decree, directing that they exhibit the same under oath; the executors of D. Newbold exhibited a claim against the debtor, under affirmation, which, on the 9th August, 1814, amounted to five hundred and twenty dollars and sixty cents, founded on an order and receipt, dated 25th December, 1811, (eight days after the first assignment,) which was disallowed by the master, on the ground that the amount due to D. Newbold, on which a dividend was to be received, was fixed by the decree, and no other allowance could be made. Upon exception to the master's report,—held, that this claim is not barred by the terms of the decree.

The proper construction of the decree is, that the complainant is to distribute among the creditors according to the provisions of the insolvent act, and in so doing is to take the sums found due to the former assignees, at the date of the first assignment, as the sums actually due, without farther examination, up to that time; they having been computed up to that time, that computation is to be considered as settled. But as to any claims not previously adjusted, they are to stand in the same situation as other creditors.

Prichett v. Ex'rs of Newbold et al.

As the terms of the decree do not, *necessarily*, exclude such construction, the court will give it an interpretation which shall consist with equity, and the principles of the statute on which it is founded.

The master, in taxing the allowance to be made to the assignee, for his time, trouble, and the expenses of the suit, included interest on payments necessarily made before any funds came to hand: on exception, the interest was allowed.

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On the 17th of December, 1811, Samuel Hewlings executed an assignment of all his estate to Daniel Newbold, Samuel Haines, and Isaac Hewlings, in trust to pay and satisfy the claims of the said assignees against him, and in further trust to pay over the balance, if any, to the use of the said Samuel Hewlings, the assignor. Some time after, Samuel Hewlings became an insolvent debtor, and as such was discharged from confinement under the insolvent laws of the state, and Jacob Prichett, the complainant, was appointed his assignee, in due form of law. In 1816, Prichett filed his bill against the original assignees, for the purpose of setting aside the deed of assignment, and obtaining an account, and possession of the property for distribution. In the term of July, 1820, it was referred to a master, to take an account of the debts due from Samuel Hewlings to Newbold, Haines, and Isaac Hewlings, the original assignees, on or before the 17th day of December, 1811, being the day of the assignment; and of the moneys received by them in virtue of the assignment; and also of the moneys due to Samuel Hewlings on the day of the assignment, and the amount received by him since that time, as also the amount surrendered when he took the benefit of the insolvent laws.

The master reported, that he found due from Samuel Hewlings, to

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|---|---|---|
| 1. Daniel Newbold, the sum of | | $39 24 |
| 2. Samuel Haines, | - - | 108 26 |
| 3. Isaac Hewlings, | - - | 622 16 |
| | | $763 66 |

He reported further, that the assignees had received by virtue of the assignment, two thousand five hundred and sixty dollars and forty-three cents; that the amount due to Samuel Hewlings on the day of the assignment, was three thousand four hundred

and thirty-nine dollars and seventy-six cents: that the amount received by him after the assignment, was seven hundred and eighteen dollars and ten cents; and that when he took the benefit of the insolvent laws, he had no property whatever to surrender to his assignee for the benefit of his creditors.

In October, 1828, the report was confirmed, and it was decreed that the original assignment was fraudulent and void; that the assignees deliver over the said sum of two thousand five hundred and sixty dollars and forty-three cents found to be in their hands, and also the books and other property mentioned in the report, to the complainant; and that, after deducting the money by him paid and expended in and about the prosecution of the suit, and also a reasonable compensation for his time, trouble, &c., to be taxed by one of the masters, he forthwith proceed to make a dividend of the balance among the creditors of the said Samuel Hewlings, agreeably to the statute concerning insolvent debtors. Also, that the original assignees, respectively, receive a dividend as creditors of the said Samuel Hewlings, for the sums found due to them respectively, by the said master's report, as above stated.

In March, 1830, the complainant came into court by his petition, and representing that great difficulties had arisen in adjusting the accounts and ascertaining the several sums due to the claimants, prayed that it might be referred to a master to inquire and report what sums were really due from the said Samuel Hewlings at the date of the said deed of assignment, to the several persons claiming to be creditors. Upon this it was referred to Abraham Brown, esquire, one of the masters, &c., to inquire and report what sum or sums of money were due to the creditors who had exhibited their claims to the complainant, agreeably to the decree; and that they exhibit their accounts under oath, &c.

In October, 1831, the master reported his proceedings, and in the report stated, among other things, that John Black, one of the executors, &c. of Daniel Newbold, deceased, in behalf of himself and his co-executor, Thomas Black, exhibited under affirmation a claim against the said Samuel Hewlings, founded upon a receipt and order, bearing date the 25th day of December, 1811, the amount of which, on the 9th of August, 1814, being

the date of the last assignment, was five hundred and thirty-two dollars and sixty cents; and that he disallowed this claim, on the ground that the amount due to Daniel Newbold, and on which a dividend was to be made, was specifically fixed by the decree of October, 1828, and that no other allowance could be made to him according to the terms of that decree.

This part of the report has been excepted to by the executors of Daniel Newbold, deceased; and it is insisted that the decree has not been properly construed by the master.

*G. D. Wall,* for complainant;

*G. Wood,* for defendants.

THE CHANCELLOR. The object of the suit is to have a just and equitable distribution of the property among the lawful creditors of Samuel Hewlings. The original assignment being out of the way, and the money and effects being collected by the complainant, it only remained to ascertain the mode in which distribution was to be made. The master has calculated the claims and interest up to the 9th of August, 1814, being the date of the last assignment, and I think with propriety. The complainant, as assignee, is, upon general principles, bound to pay all lawful debts due and owing by the insolvent debtor, up to the time of making application for a discharge; and if this principle is to prevail, there can be no doubt that the claim in dispute should be allowed, if just in itself. But the difficulty in this case arises from the terms of the decree of October, 1828. This decree, as we have already seen, directs a dividend among the creditors generally, and specifies the amount found due to the original assignees by the master's report, as the amount on which they are to receive dividends. At first view, the meaning of the decree appears to be that adopted by the master, and such construction would seem to conform best to the words of the decree; and yet I cannot understand why it is so framed, as to bar any claims of the assignees after the 17th of December, 1811, while at the same time the claims of others are allowed up to 1814. I do not find that they have forfeited any rights as general credi-

tors. At the same time it is to be observed, that on examination of the claims presented and allowed by the master, there are none subsequent to the 17th of December, 1811, the date of the first assignment. It does not appear that any such were presented, and no question has been raised on the subject.

I think the better construction of the decree is this; that the complainant is to distribute among the creditors according to the provisions of the insolvent act; and that, in so doing, he is to take the sums found due to Newbold, Haines, and Isaac Hewlings, as the sums actually due without further examination, up to the 17th of December, 1811—they having already been computed up to that time. That computation is to be considered by the complainant as final and settled; but as to any claims not previously adjusted, they are to stand in the same situation as others. At all events, the terms of the decree do not necessarily exclude such a construction; and that being the case, I feel bound to give it an interpretation which shall consist with equity, and the principles of the statute upon which this part of the decree is founded. To say that the distribution is to be made agreeably to the statute, and yet to exclude a debt coming within its provisions, without any cause assigned, is a contradiction which the court cannot adopt.

My conclusion, therefore, is, that the claim is not barred by the fair construction of the decree, and, if right in itself, should be allowed and a dividend awarded upon it. It does not appear, however, that the master has examined into the consideration or validity of the claim. He has merely stated it, and, conceiving it to be excluded by the decree, has disallowed it, without any inquiry into the merits.

The exception must be allowed, but the complainant must have an opportunity to investigate the merits of the claim, if he shall desire it.

The second exception relates to the allowance made the assignee by the master.

The order of 1828 directed a taxation of the expenses of the suit, and of the allowance to be made the assignee for trouble, time and expenses. The master has allowed for time, trouble, and expenses, including interest for payments necessarily made

before any funds came to hand, the sum of nine hundred dollars. According to the calculation of the master, which is made with great care and particularity, the interest on the advancements amounts to three hundred and fifty dollars and ninety-five cents, leaving a balance of five hundred and forty-nine dollars and five cents as a compensation to the complainant for all his trouble, care, and responsibility. This appears to be a large sum; but when it is considered that this matter has been pending upwards of sixteen years, and that it may not be closed under a year or two more, (distribution among the numerous creditors being not yet made,) I cannot say that it is unreasonable, or that it requires the interference of the court. No complaint has been made of any want of attention or faithfulness in the complainant. If the interests of creditors had been neglected in his hands, the case would be altered materially, and the court would take care not to reward negligence.

The second exception is disallowed.

The third exception relates to the interest allowed upon advances.

This allowance appears to me to be correct, especially when the items are all exhibited, as in this case, and when it is not a mere lumping charge. If interest has been received upon moneys in hand, since the property has been collected, it would be right that such interest should be accounted for in the final settlement. That matter was not before the master, and is not necessarily connected with the exception.

The third exception is also disallowed.

JOSEPH HENDRICKSON v. THOMAS L. SHOTWELL AND ELIZABETH HIS WIFE—ON BILL FOR RELIEF, &c.

THOMAS L. SHOTWELL v. JOSEPH HENDRICKSON AND STACY DECOW—ON BILL OF INTERPLEADER, &c.

The court of chancery, and every other court in New-Jersey, has the power and the right, to ascertain by competent evidence, what are the religious principles of any man or set of men; when civil rights are thereon to depend, or thereby to be decided. Page 633.

This court cannot inquire into the doctrines and opinions of any religious society, for the purpose of deciding whether they are right or wrong; but may inquire into them as facts pointing out the ownership of property. Pages 671, 682.

If a fact be necessary to be ascertained by the court, for the purpose of settling a question of property, it is the duty of the court to ascertain it; and this must be done by such evidence as the nature of the case admits of. Page 679.

If the doctrines held by any religious society be important in determining a question of property; the party who would avail themselves of their doctrines, must prove them. Page 682.

Where a fund was raised by members of a religious society known as "the Chesterfield Preparative Meeting of the Society of Friends, or people called Quakers, at Crosswicks," for the declared purpose, "that the principal should remain a permanent fund, under the direction of the trustees of the school at Crosswicks, to be chosen by the said Preparative Meeting; and the interest should be applied to the education of such children as then or thereafter should belong to the same Preparative Meeting, whose parents should not be of ability to pay for their education;"—this fund may not be divided, as often as this body shall separate, and parts of it diverted from its declared purpose, and appropriated to the education of children of persons connected with other religious persuasions. Page 670.

The trust can be exercised, only, by a meeting of the religious *society of Friends;* and the fund can be used, only, for the education of children of persons belonging to a meeting of that society. Page 670.

It is a body of Friends, with their settled and known characteristics at that time, which is contemplated in the trust. Page 671.

It is proper and legal, that the court should notice the doctrine of the Preparative Meeting which is to superintend the expenditure of this fund. Page 683.

A separation of a portion of the religious society of Friends constituting the yearly meeting of the society, from that meeting, does not necessarily destroy or impair it, nor as it respects its legal existence, even weaken the original institution. Page 652.

A portion of any religious society cannot disfranchise the rest, declare the society dissolved, erect among themselves a new body within the limits of the ancient society, and declare that to be the ancient society. Pages 644-5-6.

Where an officer of a religious society was duly appointed, and the term of his office does not cease by limitation of time, the presumption is that he remains in office, until competent evidence of his due removal is given: and whoever claims on the ground that his office has ceased, must establish it by lawful and sufficient proof. Page 600.

When a majority of an elective body protest against the election of a proposed candidate, and do not propose any other candidate, the minority may elect the candidate. Page 621.

*Semble.* That where a donation is made for the use of a certain religious society at a particular place, the right is local and vests in such religious society at that place; it also vests in a society at that place, of the same religious persuasion, holding and professing the same religious opinions, doctrine and belief; and if that society should become divided in religious opinion, and separate into two distinct bodies, holding different doctrines, the right of property would remain with that portion of the society which held the same religious opinions, doctrine and belief, which the original society held at the time the donation was made, without regard to the fact whether they were a majority or minority of the members of the original society.

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The controversy in this case, which arose upon a bill for the foreclosure of a mortgage, grew out of a difference of religious views and feeling that had arisen in the society of Friends, and excited a deep interest among a large and respectable portion of the community. The society had its origin in England about the middle of the seventeenth century, and was introduced into this country by some of the early settlers in New-Jersey and Pennsylvania. Primary meetings, for worship, were first formed by members of the society residing near each other; a monthly meeting was soon after formed in the county of Burlington; and upon invitations from this monthly meeting, to other meetings and members of the society, they met at Burlington, on the third first-day of sixth month, (June,) A. D. 1681, and formed the first yearly meeting of the society of Friends. This meeting was increased and enlarged by the association of other meetings and members of the society, until it comprehended all the members of the society, and their meetings and judicatories of inferior grade, in the then provinces of New-Jersey and Pennsylvania. It corresponded with other bodies of the same religious society in other provinces, and with the yearly meeting of the society of Friends in London: by which it was recognized as a yearly meeting of the society of Friends.

The yearly meeting thus established, from 1684 to 1761 was held alternately at Burlington and Philadelphia: since that period it has been held altogether in Philadelphia. The day of meeting has been several times changed, until 1798, since which period, by a rule of the meeting, it has uniformly met on the third second-day of the fourth month (April) in each year, at the Friends' meeting house in Arch street; and has been known as "the Philadelphia Yearly Meeting of the society of Friends."

Soon after the yearly meeting was established, the Burlington quarterly meeting was formed, and the system of ecclesiastical government of the society in England adopted here. According to this system, the meetings of the society are of two kinds; meetings for worship, and for discipline or business. They are four in number, connected together and rising in gradation as follows:—Preparative meetings, consisting of all the members of one meeting for worship; which are connected with and subordinate to a monthly meeting, consisting of several preparative meetings; which is connected with and subordinate to a quarterly meeting, consisting of several monthly meetings; and which is connected with and subordinate to the yearly meeting, which is the head of the whole society within its jurisdiction.

Besides these, there is a "meeting for sufferings," which is a subordinate department of the yearly meeting, to exercise care during the intervals between the stated sessions of that body.

The "Chesterfield preparative meeting of the society of Friends," was established at an early period, and was connected with the Chesterfield monthly meeting and Burlington quarterly meeting, which was subordinate to the Philadelphia yearly meeting held in Arch street.

In 1778 the yearly meeting reiterated a previous recommendation to the quarterly meetings, and through them to the monthly and preparative meetings, to collect funds for the establishment and support of schools under the care of committees to be appointed by the several monthly or preparative meetings. To promote this object a subscription was opened, and a number of Friends, styling themselves "members of the preparative meeting of the people called Quakers at Crosswicks," subscribed liberal sums, which they engaged to pay "to the treasurer of the

school at Crosswicks, begun and set up under the care of the preparative meeting:" declaring the purpose of these donations to be, "that the principal so subscribed is to be and remain a permanent fund, under the direction of the trustees of the said school, now or hereafter to be chosen by the said preparative meeting, and by them laid out or lent on interest, in such manner as they shall judge will best secure an interest or annuity: which interest or annuity is to be applied to the education of such children as now do or hereafter shall belong to the same preparative meeting, whose parents are or shall not be, of ability to pay for their education." The foundation of the school fund being thus laid, additions were afterwards made to it, by donations from individuals and contributions from the funds of the monthly and quarterly meetings, for the same purpose. Upon this basis the school fund was established, and as early as 1790 a school was commenced, and has since been continued, at Crosswicks.

In 1816 Joseph Hendrickson was appointed, by the Chesterfield preparative meeting of the society of Friends at Crosswicks, "treasurer of the school fund of the meeting at Crosswicks." In April, 1821, he loaned two thousand dollars of this fund to Thomas L. Shotwell upon bond and mortgage; upon which the interest was regularly paid up to 2d April, 1827.

The society of Friends in New-Jersey and Pennsylvania had continued in unity and great harmony, under the government and control of the yearly meeting in Philadelphia, from its first establishment at Burlington, until a few years before the commencement of the present suit; when differences of religious opinions and feelings arose, which were soon disseminated through the society to a great extent, and produced a division of the society into two parties, marked by characteristic differences of opinion upon religious doctrines, since, to distinguish them, denominated the "Orthodox" and the "Hicksite" parties or portions of the society of Friends.

In 1827 the yearly meeting assembled at the stated time and place, the third second-day of fourth month, (April,) at the meeting house in Arch street. They transacted business, continued in session to the end of the week, and then regularly ad-

journed to meet again at the same place on the third second-day of the fourth month in the next year.

At this meeting, however, the divided state of the society became manifest; differences of opinion and feeling prevailed; and on the 19th, 20th and 21st days of April, and during the session of the yearly meeting, a portion of the members, dissatisfied with some of the proceedings of the yearly meeting, and especially with the appointment of clerk and of committees to visit subordinate meetings—held another meeting, of those who united with them in opinion, in Green street, at which an address to the society of Friends was agreed on and signed by order of the meeting; in which, after alluding to the divided state of the society in doctrine and feeling, and to measures of the yearly meeting deemed oppressive, they state their conviction "that the period had fully come in which they ought to look to making a quiet retreat from that scene of confusion." This meeting adjourned to meet again on the fourth day of sixth month, (June,) 1827; at which time they again met at the same place, and agreed upon and published a second address to the society of Friends. In this address, after alluding to the disorder and division in the society, expressing their regret at its continuance, and declaring, that to them there now appeared to be no way to regain the harmony and tranquillity of the body, but by withdrawing themselves, not from the society of Friends, nor from the exercise of its salutary discipline, but from religious community with those who had introduced and seemed disposed to continue such disorders among them." The address concludes by proposing for consideration, the propriety and expediency "of holding a yearly meeting of Friends in unity with us, residing within the limits of those quarterly meetings heretofore represented in the yearly meeting held in Philadelphia," on the third second-day of tenth month, (October,) then next.

Pursuant to this proposition, a meeting of those members of the society who united in this measure, was held, on the third second-day of tenth month, 1827, in Green street, Philadelphia; at which they formed a yearly meeting, and adjourned to meet again on the second second-day of fourth month, (April,) 1828, in Green street, Philadelphia; at which time and place a yearly

meeting of this portion of the society of Friends was accordingly held, and has since continued to be holden annually.

This division of the ancient yearly meeting of the society of Friends in Philadelphia, in April, 1827, was followed by corresponding divisions of the subordinate meetings, under its control and jurisdiction; especially of the Burlington quarterly meeting, which separated in eleventh month, 1827: the Chesterfield monthly meeting, which in tenth month, 1827, separated into two bodies, one of which appointed delegates to attend the yearly meeting held in Green street, in Philadelphia, in that month. The separation in the Chesterfield preparative meeting at Crosswicks, took place in twelfth month, 1827, when they were divided into two distinct bodies or meetings, each of which called themselves "the Chesterfield preparative meeting of the society of Friends at Crosswicks," and claim a right to have the control and disposition of the fund for the support of the school at Crosswicks.

In first month, 1828, one of these meetings assembled to appoint trustees of the school fund, and at that meeting also appointed Stacy Decow, one of the parties to this suit, treasurer of the said fund. This meeting, by which Decow was appointed, is attached to the Chesterfield monthly meeting, and Burlington quarterly meeting, which unites with and acknowledges the Green street yearly meeting; which they insist is the original "Philadelphia yearly meeting of the society of Friends," revived and replaced on its ancient foundations.

Joseph Hendrickson belongs to the other preparative meeting of the society of Friends at Crosswicks; and, as they insist, still remains the treasurer of the school fund, his office being during the pleasure of the meeting, and they having taken no steps to remove him or appoint another treasurer. This preparative meeting is attached to the Chesterfield monthly meeting, and Burlington quarterly meeting, which unites with and adheres to the Philadelphia yearly meeting in Arch street, as the head of the society, which they say is the true ancient "Philadelphia yearly meeting of the society of Friends."

After this separation took place, and the appointment of Decow as treasurer, Thomas L. Shotwell, the mortgagor, refused

to acknowledge Hendrickson as the treasurer of the fund for the support of the school at Crosswicks, or to pay him the interest on the bond and mortgage. Upon this refusal, Hendrickson exhibited the bill in this case, for foreclosure of the mortgage. In his bill, after stating the origin and purpose of the school fund, his appointment as treasurer, the loaning of the money and the mortgage, he sets forth the pretension on the part of Shotwell that Stacy Decow was the lawful treasurer of the school fund, and entitled to receive the money; and for the purpose of rebutting this pretension, sets forth particularly the controversy in the society, and their division into two parties, as above mentioned. He alleges that the ground of this division was on account of religious doctrine. He charges that the following religious doctrines have always been held and maintained by the society of Friends or people commonly called Quakers:—

In the first place, although the society of Friends have seldom made use of the word Trinity, yet they believe in the Father, the Son or Word, and the Holy Spirit. That the Son was God, and became flesh. That there is one God and Father, of whom are all things. That there is one Lord Jesus Christ, by whom all things were made, who was glorified with the Father before the world began, who is God over all, blessed for ever. That there is one Holy Spirit, the promise of the Father and the Son; and leader, and sanctifier, and comforter of his people: and that these three are one, the Father, the Word, and the Spirit. That the principal difference between the people called Quakers, and other protestant trinitarian sects, in regard to the doctrine of the Trinity, is, that the latter attach the idea of individual personage to the three, as what they consider a fair logical inference from the doctrines expressly laid down in the Holy Scriptures. The people called Quakers, on the other hand, considering it a mystery beyond finite, human conception, take up the doctrine as expressly laid down in the Scripture; and have not considered themselves warranted in making deductions, however specious.

In the second place, the people called Quakers have always believed in the atonement; that the divine and human nature of Jesus Christ the Saviour, were united; that thus united he suffered; and that through his suffering, death and resurrection, he

atoned for the sins of men. That the Son of God in the fulness of time took flesh, became perfect man according to the flesh, descended and came of the seed of Abraham and David. That being with God from all eternity, being himself God, and also in time partaking of the nature of man, through him is the goodness and love of God conveyed to mankind; and that by him again man receiveth and partaketh of these mercies. That Christ took upon him the seed of Abraham, and his holy body and blood was an offering and a sacrifice for the sins of the whole world.

In the third place, the people called Quakers believe that the Scriptures are given by inspiration; and when rightly interpreted are unerring guides; and, to use the language adopted by them, they are able to make wise unto salvation through faith which is in Christ Jesus. They believe that the Spirit still operates upon the souls of men, and that when it does really and truly so operate, it furnishes the primary rule of faith. That the Scriptures proceeding from it, must be secondary in reference to this primary source, whence they proceed; but inasmuch as the dictates of the Spirit are always true and uniform, all ideas and views which any persons may entertain repugnant to the doctrines of the Scriptures, (which are unerring,) must proceed from false lights.

That such are the doctrines entertained and adopted by the ancient society of Friends; and that the same doctrines are still entertained by the Orthodox party aforesaid, to which party the complainant belongs. That these doctrines are with the said religious society fundamental; and any individual entertaining sentiments and opinions contrary to all or any of the above mentioned doctrines, is held not to be of the same faith with the society of Friends or people called Quakers, and is treated accordingly.

The bill further charges, that the Hicksite party aforesaid, do not adopt and believe in the above mentioned doctrines, but entertain opinions entirely and absolutely repugnant and contrary thereto.

In regard to the first religious doctrine above named, the Hicksite party aforesaid believe, that Jesus Christ was a mere

man, divinely inspired, partaking more largely of divine inspiration than other men; but that others, by resorting to the same means, and using the same exertions, may receive the same portion or measure of divine inspiration. That Jesus Christ, as well as the apostles and prophets, never has been and never can be set above other men. And though of late, the said Hicksite party sometimes ascribe divinity to Jesus Christ, yet they do it only in a figurative sense, from the circumstance of his partaking more largely than other men of divine inspiration. In every other respect they consider him a mere man. They do not believe that he partakes of the divine as well as human nature; that he is one and the same essence with God, with that supreme and omnipotent Being who presides over and governs the universe.

In respect to the second religious doctrine above mentioned, the Hicksite party deny the doctrine of the atonement above set forth, and they contend and believe that man may have access to his God without any Mediator. They contend that the crucifixion and sufferings of Christ, if an atonement at all, were an atonement only for the legal sins of the Jews.

In respect to the third doctrine above mentioned, the Hicksite party deny the certainty and divine inspiration of the Holy Scriptures, and hold that they contain doctrines and injunctions which are incorrect; and that they are a mere shadow.

That these discrepancies in religious doctrines above mentioned, between the Hicksite and the Orthodox parties, are radical and all-important in the opinion of the complainant and his party, in reference to the principles and tenets of religion, as held by the ancient fathers of this religious society. The Orthodox party, believing, as they firmly do, that the doctrines entertained by the Hicksite party, strike at the foundation and main pillars of the Christian religion; that in consequence of these differences in doctrine, the Hicksite party are not in the same faith with them, and the ancient religious society of Friends.

The bill then charges, that during the yearly meeting of the Society of Friends in Philadelphia, which commenced on the third second-day of April, 1827, the Hicksite party held several private irregular meetings of their own party, which no other

members of the society attended, or were invited to attend; at which they agreed on and published an address to the society. That they again met in sixth month, (June,) and published another address, among other things proposing for consideration the propriety of holding a yearly meeting of Friends in unity with themselves, and recommending another meeting to be held in Philadelphia on the third second-day in October then next. That in pursuance of this recommendation they met in Philadelphia in October, 1827, and then and there, contrary to the discipline, constitution and government of the society of Friends, formed a new yearly meeting of their own party: which was adjourned to the second Monday in April, 1828. That on that day they met, and held their new yearly meeting in Green street, Philadelphia.

That on the third Monday in April, 1827, pursuant to adjournment from the preceding year, the Orthodox party held the ancient yearly meeting of the Society of Friends, in Arch street; which still continues to be holden by them on the third Monday in April annually; which they say is the ancient "Philadelphia yearly meeting of the society of Friends," and which is recognized by the ancient yearly meeting in London as a regular yearly meeting of the Society of Friends, and is in correspondence and fellowship with them: whereas the new yearly meeting of the Hicksite party is not recognized by the yearly meeting of London, and holds no correspondence with them. That the Hicksite and Orthodox parties are thus completely divided, and no longer form two parties of the same society, but two distinct religious communities. That the Hicksite party have seceded, not only from the faith, but from the religious institutions and government of the society of Friends.

The bill likewise charges, that these religious dissensions and divisions exist in the Burlington quarterly, and the monthly and preparative meetings at Crosswicks. That the Hicksite party and the Orthodox party there hold separate meetings for business and worship; the former being under the jurisdiction of the new yearly meeting held in Green street, and the latter under the jurisdiction of the ancient Philadelphia yearly meeting held in Arch street; which does not recognize the preparative meeting at

Crosswicks held by the Hicksite party, by which Stacy Decow was appointed treasurer.

Upon the filing of this bill, Thomas L. Shotwell, the defendant, exhibited a bill of interpleader against Hendrickson and Decow, the two adverse treasurers of the school fund; in which he sets forth the claims and pretensions of both the said parties, respectively; and that by reason of these conflicting claims he is in danger of being greatly harassed on account of his said bond and mortgage; which he offers to pay, on being indemnified by the decree of the court.

To this bill Hendrickson filed an answer, in which he reiterates and insists on the various grounds charged in his original bill.

Decow, in his answer, admits the origin, establishment and purpose of the school fund, as above set forth. That the Chesterfield preparative meeting of the society of Friends at Crosswicks, have a right to appoint trustees of the said school fund, and are entitled to the control, use and disposition thereof. That the meeting also appoints the treasurer, who holds his office during the pleasure of the meeting. He admits that, in 1816, Joseph Hendrickson was appointed by the said meeting, treasurer of the said school fund; and that he made the loan to Shotwell upon bond and mortgage: admits the filing of the original bill and bill of interpleader, as above stated, but says he denies many of the charges contained in the original bill.

He alleges, among other things, that the preparative meeting of the society of Friends at Crosswicks; which comprised at least two-thirds of the original subscribers and contributors to the said school fund and their lawful representatives, and were a lawful majority of the regular and lawful members of the Chesterfield preparative meeting of the society of Friends or people called Quakers at Crosswicks, and had the lawful right to appoint the treasurer and trustees of the said school fund, and right to the care, use and disposition thereof; on the 31st day of first month, 1828, appointed him (Decow) treasurer of the said school fund, and successor of the said Joseph Hendrickson, and that he now is the treasurer, and entitled to the money due on said bond and mortgage.

He says, that the religious society of Friends are a well known denomination of Christian professors, who became associated under that name in England about the middle of the seventeenth century. That they early adopted a system of discipline, which has continued in use ever since: the rules and regulations of which relate, partly to the preservation of a decent and comely order in its internal polity—partly to the observance of the principles of morality and justice by all belonging to it—and partly to the maintenance of its peculiar testimonies; which rules are subject to alteration, modification and revision by the society, and have been revised, altered and modified, from time to time, as circumstances appeared to require. That the said society, in reference to its members, is a pure democracy; all its members having equal rights; neither ministers, elders, clerks or other officers having any pre-eminence over their brethren, in right, authority, rank or privilege. That the society in England have a yearly meeting, and the society in this country have yearly meetings, but the said yearly meetings are wholly independent of each other, as well in their establishment, as in their government and authority.

He admits the introduction of the society into this country, and the establishment of the preparative, monthly, quarterly and yearly meetings, as stated; and says that the executive power, as relates to discipline, is lodged in the several monthly meetings. That the quarterly meetings are merely a larger meeting of the members of the monthly meetings, and established by them; and the yearly meetings are only a larger meeting of the members of the same monthly meetings; which are represented through their different quarters, by members therein appointed, merely as organs of communication, that all parts of the society may be represented, but not placing in their hands any control over their brethren: the power remaining in the brethren at large, the great democratic body; to whom only the name, title and authority of the yearly meeting belong.

That the superior power resides in the individual members of the several meetings; therefore the monthly meeting, being established by mutual consent and agreement of the members of the society, delegating to it certain powers; and the quarterly

and yearly meetings each having their powers and duties delegated, which are defined and regulated by the rules contained in a book of discipline, can have no other or greater rights or powers than those therein granted to them: what is not thus granted remains with the individual members of the society, the original possessors of the whole power.

That in the yearly meeting, such regulations as from time to time appear expedient, and tend to the good of the whole society, are proposed and agreed on, and comprehended in a book of discipline; and all questions are resulted by the verbal or silent acquiescence of the members collected, and not by any order of members as having a rank or authority in the meeting above others. If any new proposition be made, which does not accord with the views of the members generally, it is suspended, or dismissed. It does not of right review the proceedings of the subordinate meetings, except in the single case of an appeal, made by a member considering himself aggrieved by a monthly meeting in disowning him; and recourse to it is seldom had from the subordinate meetings, except for advice, in cases of uncommon difficulty arising in monthly or quarterly meetings. And all questions and matters submitted to a preparative, monthly, quarterly or other meeting of the society of Friends, in relation to the religious or temporal affairs of the society, are determined by the voice or consent of the *majority* present, ascertained either by their expressed assent or silent acquiescence.

That the said society of Friends hath been preserved in a great degree of harmony until lately, when a few individuals, who had long been continued in important stations, began to assume an authority over their brethren, never delegated to them; and attempted to impose upon the yearly meeting, a document in a form designed to operate as a *written creed*, adapted to their own particular views, and subversive of that freedom of thought and individual opinion which the society of Friends had always cherished and maintained as an unalienable right. That such document was promptly rejected by the yearly meeting; and it soon became manifest that a party was formed, assuming the character and title of the *Orthodox;* and a line of discrimination was attempted to be drawn through the different meetings, in

order to fill every active station with those under their particular influence, or actuated by a common object. Approved ministers were publicly opposed; and faithful members, who bore a testimony against their systematical declension from the principles and practice of the society, were actually proscribed, and publicly disowned.

These efforts to monopolize a power before unknown to the society, subversive of equal rights, introducing disorder and confusion, and preventing the orderly course of business in the monthly and quarterly meetings, were continued until the yearly meeting in fourth month, 1827, when a clerk was forced upon the said meeting by the Orthodox party, in decided opposition to the voice of a large majority of the representatives, and openly declared judgment of a large body of Friends, expressed at the time. By this and other party acts, they broke the compact which had long bound the meeting together as a band of brethren; and the business that was done at that meeting was mainly the acts of that party, and not of the whole body. More especially, after having agreed in the opinion that the yearly meeting was not then in a situation to consider and act upon divers important subjects, contained in reports from quarterly meetings; the said Orthodox party did, at the last sitting of the said meeting, appoint a large committee of their own party exclusively, to go down to the inferior meetings to take care of their own members; although the appointment of a committee was strongly opposed at the time, by a large number of Friends, and a majority of the meeting.

At this last sitting of the meeting, after Friends had fully ascertained that all their endeavors to have the business done as the acts of the meeting, not as those of the said party, were unavailing; and having been deprived from participating in the business; they ceased their further endeavors to participate therein: and the adjournment which took place was the exclusive act of the orthodox party, and not of the body of the society of Friends, and therefore not binding upon the meeting. And inasmuch as the larger part of the members of the said yearly meeting, could not conscienciously consent to meet again, in the same capacity, with the said Orthodox party; and there being no con-

stitutional time for the assembling of the yearly meeting; the time of holding it was changed to the time it is now held, to wit, on the *second* second-day of fourth month; which the society of Friends might lawfully do, without forfeiting their rights by a mere variation in the time and place of meeting; which is legitimately subject to their control and appointment.

The subsequent course pursued by Friends, was the act of the main body, in the exercise of the original powers vested in them, in order to the attainment of that peace and harmony for which they had so long been distinguished. In pursuing which, the said yearly meeting assembled again on the second second-day of fourth month, 1828, and is now settled on its ancient foundations and principles, comprising full three-fourths of the whole body of its former members; who are united in the same system of discipline, maintaining the same testimonies, and holding the same religious faith as their forefathers, the ancient society of Friends. In which meeting, all the quarterly meetings previously composing it, are now represented. The defendant denies, therefore, that it is a new yearly meeting within the pale of one already in existence.

The defendant farther says, the society of Friends acknowledge no head but Christ and no principle of authority or government in the church, but the love and power of God operating on the heart, and thence influencing the judgment, and producing a unity of feeling, brotherly sympathy and condescension to each other. That the great fundamental principle of the society—*the Divine light and power operating on the soul*—being acknowledged by all its members, as the effective bond of union; the right of each individual, to judge of the true meaning of scripture testimony relative to the doctrines of Christianity, according to the best evidence in his own mind, uncontrolled by the arbitrary dictation of his equally fallible fellow man; has been tacitly, as well as explicitly, acknowledged by the society.

The defendant avers and insists, that the said Chesterfield preparative meeting of Friends at Crosswicks, to which he belongs, is the same meeting under whose care the school fund was placed by the contributors thereto, and are identified with

them in due and regular succession; and are a part of the ancient society of Friends. That *they believe in the Christian religion*, as *contained in the New Testament*, and as professed by the ancient Friends, and adhere to the religious institutions and government of the society of Friends, and bear the same cardinal testimonies to the whole world as are held most important and characteristic in the said society; among which are, a testimony against war—a hireling ministry—against taking oaths—against going to law with brethren—and a concern to observe the golden rule, "do unto all men as we would they should do unto us." And that the persons under whom the said Joseph Hendrickson claims, are a minority of the said preparative meeting, and as individuals and collectively, have voluntarily withdrawn themselves, and seceded from said meeting, and have no longer any communion therewith.

The defendant admits there has been a controversy in the society of Friends, which has divided them: the minority assuming the name of the *Orthodox* party, and bestowing upon the majority of their brethren, from whom they have seceded, the name of *Hicksite*, a name never assumed or acquiesced in by a majority of the said society, to which the defendant belongs, and which name they deny, but claim that of Friends. And they deny being the followers of any man, or set of men; simply claiming to be the humble disciples and followers of Christ, the great head of the church: and insist, that they constitute the great body of *the society of Friends*, which name they still adhere to; and allege that they still hold, and are endeavoring to maintain and support, the doctrines, fundamental religious principles, discipline and rules of government of the ancient religious society of Friends or people called Quakers. And he denies that he the defendant, and his associates, have seceded from the faith, or from the religious institutions and government of the society of Friends, and the ancient yearly meeting in Philadelphia. And the defendant insists, that by the law and constitution of New-Jersey, the *rights of property* are sacred and inviolate, and cannot be taken from an individual without his or their consent; and more especially that it cannot be made to depend on the test of any *religious creed*, framed after its

vesting, and artfully prepared by a minority to answer its purposes.

The defendant admits, that the Chesterfield preparative meeting of Friends at Crosswicks, of which he is a member, holds communication with the yearly meeting of Friends established in Philadelphia, which the complainant in his original bill improperly calls the Hicksite party; which yearly meeting, the defendant insists, is the yearly meeting of the ancient and true society of Friends. The defendant also insists, that the question and facts introduced into the original bill, in relation to the schism in the society of Friends, and discrepancies among them in regard to matters of faith and discipline; if they exist, (which he does not admit,) and also in respect to the separation of the yearly meetings; cannot lawfully or equitably affect the right to the fund belonging to the said Chesterfield preparative meeting of Friends at Crosswicks: and submits, that the only legitimate inquiry before the court, respects the *right of property* to the bond and mortgage, and money due thereon, mentioned in the bill; and that neither this nor any other court, have a right to institute *an inquest into the consciences or faith of members of religious societies* or associations, or subject them to the ordeal of a creed, prepared by those claiming adversely, in order to disfranchise or deprive them of their property and legal right; and protests against the existence and exercise of such a power.

And the defendant says, that there may have been cases in which the yearly meeting in England took advisory cognizance of cases of appeal from the yearly meeting in Philadelphia; but they were cases of consent, and have long since ceased; and were contrary to the fundamental principles of the said yearly meetings in this country, which were independent of any other meetings, and so continue. And although it may be true, that the yearly meeting in London refuses to correspond with the Philadelphia yearly meeting to which the defendant belongs, it can have no effect on the rights of the members of the said yearly meeting in Philadelphia, which professes to be the true and ancient yearly meeting of the society of Friends.

After the filing of these answers, witnesses were examined on both sides, depositions taken, and exhibits made, which together

with the pleadings at large, will be found in "Foster's Report" of the testimony in this case, in two vols. 8vo., published in Philadelphia, 1831.

The chancellor while at the bar having been of counsel in the cause, agreeably to the practice of the court, called to his assistance on the hearing, EWING, chief justice, and DRAKE, associate justice of the supreme court, before whom the cause was argued, by

*G. Wood* and *I. H. Williamson*, for Hendrickson, the complainant in the original bill; and

*G. D. Wall* and *S. L. Southard*, for Shotwell, the defendant in the original bill, and complainant in the bill of interpleader; and Decow, the defendant.

The counsel, in their arguments, insisted on, and endeavored to sustain and prove from the evidence in the cause, the claims and pretensions of the respective parties, as set forth in the pleadings.

At the present term, the following opinions were delivered:—

EWING, Chief Justice. Joseph Hendrickson exhibited a bill of complaint in this court, stating that on the second day of April, one thousand eight hundred and twenty-one, being the treasurer of the school fund of the preparative meeting of the society of Friends of Chesterfield, in the county of Burlington, he loaned the sum of two thousand dollars, part of that fund, to Thomas L. Shotwell, who thereupon made a bond to him, by the name and description of Joseph Hendrickson, treasurer of the school fund of Crosswicks meeting, conditioned for the payment of the said sum, with interest, to him, treasurer as aforesaid, or his successor, on the second day of April, then next ensuing, and also a mortgage of the same date, by the like name and description, on certain real estate, with a condition of redemption, on payment of the said sum of money, with interest, to the said Joseph Hendrickson, or his successor, treasurer of the school fund, according to the condition of the aforesaid bond. He farther states, that Thomas L. Shotwell re-

fuses to pay the money to him, being treasurer as aforesaid, on divers unfounded and erroneous pretensions; he seeks relief in this court by a decree for the foreclosure of the mortgage, or for a sale of the mortgaged premises, and an appropriation of the proceeds to the payment of the debt.

Some time after the exhibition of this bill, Thomas L. Shotwell filed here a bill of interpleader, wherein Joseph Hendrickson and Stacy Decow are made defendants; in which he admits the above mentioned bond and mortgage, and the source from which emanated the money thereby intended to be secured, the school fund of the Chesterfield preparative meeting. He admits, also, the liability of himself and the real estate described in the mortgage, and avows his readiness and willingness to pay whatever is due. But he says Stacy Decow has warned him not to pay to Joseph Hendrickson, alleging that Hendrickson is no longer treasurer of the fund, and has therefore no right to receive; and that he is the treasurer and successor of Hendrickson, and as such claims the money mentioned in the bond and mortgage. Seeking, then, the protection of this court, and offering, on being indemnified by its power, to pay to whomsoever the right belongs, he prays that Joseph Hendrickson and Stacy Decow, may, according to the course and practice of this court, interplead, and adjust between themselves their respective claims.

Joseph Hendrickson answered this bill; and insists, as in his original bill, that he is, as he was when the bond and mortgage were executed, the treasurer of the school fund of the Chesterfield preparative meeting of Friends at Crosswicks, and is entitled to the bond and mortgage, and to receive the money due thereon.

Stacy Decow has also answered the bill of interpleader. He admits the loan of the money, part of the school fund, to Shotwell, and the due execution and delivery, and the validity of the bond and mortgage, and that when they were made, Joseph Hendrickson was the treasurer of the school fund, duly appointed by the Chesterfield preparative meeting at Crosswicks; in whom, as all the parties in this cause admit, was vested the right of appointing the treasurer of the fund. But he says, that before the filing of the original bill by Joseph Hendrickson, and "on the

thirty-first day of the first month, 1828, at a lawful meeting of the said Chesterfield preparative meeting of Friends, held at the usual time and place of meeting at Crosswicks, he was appointed, in due and lawful manner, treasurer of the said school fund, to succeed the said Joseph Hendrickson; and as such successor, became entitled to all the books, obligations and other papers, which he had in his possession, and also to the funds then in his hands, and more particularly to the bond and mortgage in the original bill and bill of interpleader mentioned, and the money due thereon; and the said Joseph Hendrickson ceased to have any right, title or claim thereto." He further insists, "that he always has continued since his appointment, and is the lawful treasurer of the said school fund, and as the successor of the said Joseph Hendrickson is lawfully entitled to have and receive all such bonds, obligations and mortgages, and the money due thereon, as had been taken for the loan of any part of the said fund in his name as treasurer of the said school fund, or payable to him, as such treasurer, or his successor."

This brief view of the pleadings is here presented, in order distinctly to exhibit, in a clear and naked manner, divested of auxiliary and explanatory matters, and especially of forensic forms, the grounds of the respective claims of the interpleading parties. And hence, we may discern, the great outlines of the enquiries which an investigation of this cause will lead us to make. For according to these pretensions, and to these alone, thus set forth in the pleadings, as they are respectively supported or subdued by the proofs the decree of this tribunal must be made, whatever other points favorable or unfavorable to either party may become manifest by the evidence.

Joseph Hendrickson claims the money, because originally made payable to him, and because he is, as he then was, the treasurer of the fund.

Stacy Decow claims the money, because payable by the terms of the bond to the successor of Joseph Hendrickson in that office, and because he became, and is such successor, and the present treasurer.

A slight sketch of the history of the establishment and organization of the Crosswicks school, and of the fund, may be inter-

esting, and will, perhaps, shed light on some step in the progress of our investigations.

The education of youth and the establishment of schools, attracted the care and attention, and brought out the exertions, of the yearly meeting of Philadelphia, at an early day. Most earnest and pressing recommendations of these interesting duties, to the consideration and notice of the society, were repeatedly made; and to render these more effectual, committees were appointed to attend and assist the quarterly meetings. In the year 1778, the yearly meeting adopted the report of a committee, "that it be recommended to the quarterly, and from them to the monthly and preparative meetings, that the former advice, for the collecting a fund for the establishment and support of schools, under the care of a standing committee, appointed by the several monthly or particular meetings, should generally take place, and that it be recommended by the yearly meeting, to Friends of each quarter, to send up the next year, an account of what they have done herein." And the report suggests the propriety of "a subscription towards a fund, the increase of which might be employed in paying the master's salary, and promoting the education of the poorer Friends' children:" 2 *vol. Evid.* 387.

The quarterly meeting of Burlington appear to have faithfully striven to promote the wise views and benevolent purposes of the yearly meeting. In 1777, and 1778, appropriate measures were adopted: 2 *vol. Evid.* 436. In 1783, the subject was "afresh recommended to the due attention of their monthly and preparative meetings, and to produce renewed exertion," a committee previously appointed, was discharged, and a new one raised; and "it is desired," says the minute, "that accounts of our progress herein, may be brought forward timely, to go from this to the ensuing yearly meeting:" 2 *vol. Evid.* 436.

Within the bounds of the Chesterfield monthly meeting, although a committee had been for some time charged with the subject, there appears no practical result, until after the meeting in April, 1788, when a new committee was appointed, "to endeavor to promote the establishing of schools, agreeably to the directions of the yearly meeting:" 2 *vol. Evid.* 349. In August, 1789, the committee reported, that they had agreed on a place

to build a school-house, and had obtained subscriptions to a considerable amount, and had agreed to lay the same before the monthly meeting for their approbation." The minute of the meeting approves, "and empowers them to proceed:" 2 *vol. Evid.* 349. To the monthly meeting of August, 1791, "the committee appointed for the establishment of schools, agreeably to the direction of the yearly meeting, reported, there is a house at Chesterfield, so far finished, that a school might be kept in it, but it is not yet occupied for that purpose; neither is there any such school within this monthly meeting." The clerk was directed "to send up" this report "to the ensuing quarterly meeting:" 2 *vol. Evid.* 349. No other action on it took place by the monthly meeting, until December, 1791, when they recommended to the preparative meeting in Chesterfield, "and they are hereby authorized," says the entry on the minutes, "to open a school in the said house, and appoint a suitable number of Friends, as trustees, to take the care and oversight thereof, and to make rules and regulations for the government and promotion of the institution; which rules and regulations shall always be inspected by the monthly meeting committee, for their approbation or disallowance; and said meeting are likewise authorized to appoint a treasurer, to receive subscriptions and donations for accumulating a fund:" 2 *vol. Evid.* 349, *exhib.* 51.

The fruit of these discreet and vigorous measures soon appeared. The house built, provision made for trustees and a treasurer, and the accumulation of a fund thus earnestly resolved, a subscription was opened, and numerous and generous donations were obtained. The original instrument of writing has been produced before us. It is an interesting record of liberality. The subscribers describe themselves to be "members of the preparative meeting of the people called Quakers, at Crosswicks." They engage to make the payments to the "treasurer of the school at Crosswicks, begun and set up under the care of the preparative meeting." And the purpose is thus declared:—"The principal whereof, so subscribed, is to be and remain a permanent fund, under the direction of the trustees of the said school, now or hereafter to be chosen by the said preparative meeting, and by them laid out or lent on interest, in such manner as they shall

judge will best secure an interest or annuity, which interest or annuity is to be applied to the education of such children as now do, or hereafter shall, belong to the same preparative meeting, whose parents are, or shall not be, of ability to pay for their education:" *Exhib.* 1, 2 *vol. Evid.* 411.

This subscription was the basis of the school fund. Accessions to it were afterwards made, by other individuals of the society; and the quarterly meeting of Burlington, who held and owned a stock, composed of donations, bequests, and the proceeds of the sale of some meeting-houses, resolved, in 1792, to divide a portion of it among the monthly meetings, "for the promotion of schools, answerable to the recommendation of the yearly meeting, by establishing permanent funds within such of the meetings where none have been heretofore, or in addition to such as are already established:" 2 *vol. Evid.* 437, *exhib.* 32. The share of Chesterfield monthly meeting having been received, was subdivided, and a part of it paid over to the treasurer of the school fund of the preparative meeting of Chesterfield, "to be applied to the use directed by the minute of the quarterly meeting:" 2 *vol. Evid.* 347, *exhib.* 51 In 1802, a farther sum, arising from the sale of "an old meeting-house," was paid to the treasurer, by the monthly meeting, to be appropriated in the same manner: *Exhib. O* 2, 2 *vol. Evid.* 347.

In this way, and by discreet and prudent management, a fund was accumulated, a school-house erected, and, as we learn from one of the witnesses, "Friends, for many years, generally had a school kept therein, under their superintendence, and frequently appropriated a part of the proceeds towards paying the teacher's salary, and for the education of children contemplated in the original establishment of the fund:" *Samuel Craft,* 2 *vol. Evid.* 350.

A part of this fund, as we have already seen, was loaned to Thomas L. Shotwell, and is the subject of the present controversy.

For the direction of the school, and for the care, preservation, and management of the fund, provision, as has been shown, was made, as well by the terms of the subscription, as by the resolution of the monthly meeting. The officers, were accordingly ap-

pointed by the preparative meeting, from time to time, as occasion required. The trustees were usually chosen in the first month of every year: 2 *vol. Evid.* 287. No fixed term of office appears to have been assigned to the treasurer; so that the incumbent remained until removed by death, resignation, or the will of the appointing body. The person who held that station when the subscription was made, continued there until 1812, when another Friend succeeded him, and remained in office until Joseph Hendrickson was duly appointed, in 1816.

The facts thus far presented are not, and from the pleadings and evidence in the cause, cannot be, the subject of dispute. There are some positions, deducible from them, which are equally clear and incontrovertible.

*First.* The money mentioned in the bond being payable to Joseph Hendrickson, as treasurer, he has an indisputable right to claim and receive it, if he remains in that office.

*Second.* Inasmuch as he was duly appointed, which is unequivocally admitted by the pleadings, and inasmuch as the term of office of treasurer does not cease by efflux of time or by previous limitation, the legal presumption is that he remains in office until competent evidence of his due removal is given.

*Third.* Such being the case, Joseph Hendrickson is not required to produce farther evidence of his right to receive the money, or of his continuance in office, or that he has been retained there by the competent authority; but whoever denies that right, or seeks to sustain any claim on the ground that he has ceased to be treasurer, ought to establish the ground by lawful and sufficient proof.

*Fourth.* Inasmuch as Stacy Decow alleges that Joseph Hendrickson was removed from office, and that he was appointed his successor and treasurer of the school fund, (and upon this removal and appointment, he rests, in his answer, for the entire support of his claim,) it is incumbent on him to establish the fact and legality of this removal and appointment.

The power of appointment and removal, as the litigating parties unqualifiedly admit, is vested in the Chesterfield preparative meeting at Crosswicks, meant and mentioned in the original subscription paper or agreement of the donors; which is distinguish-

ed as Exhibit No. 1, and which I have already referred to as the basis of the school fund. The parties also admit, or rather, insist, in their pleadings, by their evidence, and in the arguments of their counsel, that the preparative meeting is one and undivided; or in other words, that there is and can be but one body entitled to be called the Chesterfield preparative meeting, to exercise its power and authority, and especially the prerogative of removal and appointment. It farther appears from the evidence, that a body calling themselves, and claiming to be, the Chesterfield preparative meeting of Friends at Crosswicks, did, on the 31st of January, 1828, adopt a resolution and enter it on their minutes, to the following effect: "This meeting being now informed by the trustees who have the immediate care and trust of the school fund belonging to this meeting, that the person who was sometime since appointed treasurer thereof, refuses to settle the account of the said fund with them, this meeting, therefore, now think it best to appoint a Friend to succeed him as treasurer of the said fund, and Stacy Decow being now named in that service and united with by this meeting, is appointed accordingly."

We are now brought to the issue between these parties, and are enabled to propound for solution, the question on which their respective claims depend; was this body the Chesterfield preparative meeting of Friends at Crosswicks, meant and mentioned in the establishment of the school fund? If it was, Stacy Decow is the successor and treasurer. If not, Joseph Hendrickson remains in office, and is entitled to the money.

The meetings in the society of Friends are of two kinds; for worship, and for discipline, as they are sometimes called, or in other words, for business. This distinction is sufficiently correct and precise for our present purposes, and it is not necessary to pause to consider of the suggestion, I have read somewhere in the testimony or documents in the cause, or perhaps, heard from the counsel in argument, that every meeting for discipline, is in truth a meeting for worship, since he who cordially and faithfully performs any ecclesiastical duty, does thereby pay an act of adoration to the Almighty.

The meetings for business are four in number, marked and dis-

tinguished by peculiar and characteristic differences; preparative, monthly, quarterly and yearly. These are connected together, and rise in gradation and rank in the order of their enumeration. Each yearly meeting comprehends several quarterly meetings; each quarterly meeting several monthly meetings; and every monthly meeting embraces several of the lowest order, preparative meetings. The preparative meeting is connected with, and subordinate to, some monthly meeting; the monthly meeting, to some quarterly meeting; the quarterly meeting, to its appropriate yearly meeting. The connection and subordination are constitutional and indispensable: insomuch, that if any quarterly meeting withdraws itself from its proper yearly meeting, without being in due and regular manner united to some other yearly meeting, it ceases to be a quarterly meeting of the society of Friends. In like manner of the other meetings, down to the lowest. So that if a preparative meeting withdraws from its peculiar monthly meeting, and does not unite with another of the same common head, or some other legal and constitutional head, or in other words, some acknowledged meeting, it does, from the moment, and by the very act of withdrawal, cease to be a preparative meeting of the society of Friends.

The truth of the position I have thus laid down, respecting connection and subordination, will not, I presume, in the manner and to the full extent which I have stated, meet with any denial or doubt. Yet, as it is of considerable importance in the present cause, I shall show that it is established; first, by the constitution or discipline of the society; second, by their usages, or as they might be called, in forensic language, cases in point, or precedents; and lastly, by the opinion of the society at large, so far as may be learned from the views of well-informed members.

In the first place, then, as proposed, let us look into the book of discipline. We find there the following clear and explicit language. "For the more regular and effectual support of this order of the society, besides the usual meetings for the purposes of divine worship, others are instituted, subordinate to each other; such as, first, preparative meetings, which commonly consist of the members of a meeting for worship; second, monthly

meetings, each of which commonly consists of several preparative meetings; third, quarterly meetings, each of which consists of several of the monthly meetings; and fourth, the yearly meeting, which comprises the whole." "These meetings have all distinct allotments of service." The connection of the several meetings, and their subordination, in the manner I have suggested, are here most plainly and unequivocally shown and established. The place which this clause occupies in the discipline or constitution, (and the latter name seems more familiar, or at least to convey to professional minds, more distinct ideas, serves to illustrate its importance. It is mentioned at the commencement; as if, one of the first truths to be taught and known; as if, the very foundation of the structure of discipline raised upon it. The article on appeals speaks the same idea. A person aggrieved may appeal from the monthly meeting to the quarterly meeting, and the monthly meeting are, in such case, to appoint a committee to show the reasons of their judgment and submit it there, where the judgment is to be confirmed or reversed. From the quarterly meeting, an appeal may be taken to the yearly meeting, where a committee are to attend with copies of the records of the monthly and quarterly meetings, and where the matter is to be finally determined; and a copy of the determination is to be sent to the meeting from which the appeal came. In the article on meetings for discipline, are contained the following clauses:—"The connection and subordination of our meetings for discipline are thus; preparative meetings are accountable to the monthly; monthly to the quarterly; and the quarterly to the yearly meeting. So that if the yearly meeting be at any time dissatisfied with the proceedings of any inferior meeting, or a quarterly meeting with the proceedings of either of its monthly meetings, or a monthly meeting with the proceedings of either of its preparative meetings, such meeting or meetings ought, with readiness and meekness, to render an account thereof when required." "It is agreed, that no quarterly meeting be set up or laid down without the consent of the yearly meeting; no monthly meeting without the consent of the quarterly meeting; nor any preparative or other meeting for business or worship, till application to the monthly meeting is first made,

and when there approved, the consent of the quarterly meeting be also obtained."

Another clause requires monthly meetings to appoint representatives to attend the quarterly meetings; and that at least four of each sex be appointed in every quarterly meeting to attend the yearly meeting. Another clause is in these words: "The use and design of preparative meetings is, in general, to digest and prepare business, as occasion may require, which may be proper to be laid before the monthly meeting."

The connection and subordination of these meetings, and their relative rank or station in ecclesiastical order, being thus plainly and conclusively shown and established by the highest authority, the revered and respected rule of government for this whole religious community, we may naturally expect, what accordingly we find, numerous instances of the exercise of authority, of the subsistence of this connection, and of the fruits of this subordination, in the conduct toward each other, of the respective meetings. From the examples which are abundantly furnished us in the evidence, I shall select a very few, and I prefer, for obvious reasons, to take them from the minutes of Burlington and Chesterfield meetings. The constant intercourse by representatives, and the frequent appointment and attendance of committees from the yearly to the quarterly, and from the latter to inferior meetings, need only to be mentioned in general terms, to be brought fresh to the remembrance of all who know any thing of the ecclesiastical history of their own times or of their predecessors, or who have perused the testimony and documents before us. In second month, 1778, the quarterly meeting of Burlington directed the times of holding certain preparative meetings, so as to be convenient to a committee who were to visit them. In second month, 1820, the quarterly meeting refused to allow the holding of an afternoon meeting for worship, in Trenton, and directed their clerk to inform the monthly meeting of Chesterfield of their determination. In 1821, the Trenton preparative meeting requested of the monthly meeting, permission to continue their afternoon sittings, and leave for one year was given. In fifth month, 1825, the quarterly meeting declared, that certain persons admitted into membership in Chesterfield monthly meet-

ing, were not members, and the clerk was directed to communicate this conclusion to that meeting and to the individuals. In fifth month, 1825, the quarterly meeting *annulled* the proceedings of the Chesterfield monthly meeting respecting the reception of a person as one of its members. In eleventh month, 1825, Trenton afternoon meetings were discontinued by order of the monthly meeting. In fourth month, 1826, the Trenton preparative meeting requested permission to hold an afternoon sitting, which, at the next monthly meeting, was refused. In 1826, Thomas L. Shotwell, one of the parties in this cause, was disowned by the monthly meeting of Chesterfield. He appealed to the quarterly meeting of Burlington, where the disownment was confirmed. In the Chesterfield preparative meeting of sixth month, 1827, the extracts from the yearly meeting of fourth month, 1827, were produced and read. Contributions of money are statedly made, according to a prescribed ratio, and forwarded by the inferior to the superior meetings, and thus a stock, as it is called, is maintained in the yearly meeting. Occasional, or *ex re nata*, contributions have also, at times, been made. The yearly meeting of 1827, recommended the raising of a large sum, three thousand dollars, for a work of benevolence, and the preparative and monthly meetings of Chesterfield pursued the recommendation, and bore their usual and proportional part in carrying it into effect.

A brief reference will show that individuals, as well as meetings and the book of discipline, recognize and maintain the connection and subordination of the several bodies in the society. In the pleadings of the parties in this cause, the position is stated by each of them, especially by the interpleading parties, Hendrickson and Decow. To these documents, as far as the cause is concerned, it might suffice to refer, since whatever is admitted by both parties, is, as respects them, incontrovertible. But a recurrence to the following parts of the testimony, will show that what is said on this topic in the pleadings, is the very language and sentiment of this whole religious community. For the sake of brevity, I will content myself with mentioning the names of the witnesses, and the pages of the printed volumes, whither any one will resort who is disposed to examine them at

large. *Samuel Bettle*, 1 vol. 62, 63, 83; *Samuel Parsons*, 1 vol. 170; *Thomas Evans*, 1 vol. 271, 272, 311; *John Gummere*, 1 vol. 316; *Samuel Craft*, 1 vol. 334; *Abraham Lower*, 1 vol. 379, 405; *Halliday Jackson*, 2 vol. 144, 178, 191; *Charles Stokes*, 2 vol. 218, 229; *Josiah Gaskill*, 2 vol. 297; *James Brown*, 2 vol. 321, 322.

From this view, it seems to me, established beyond the reach of doubt, that according to the constitution of the society of Friends, a preparative meeting must be subordinate to and connected with a monthly meeting, which is connected with and subordinate to a quarterly meeting, which again is connected with and subordinate to a yearly meeting. There can be no preparative meeting which is not so connected and subordinate. To descend from generals to particulars, every preparative meeting within the bounds of the yearly meeting of Philadelphia, is, and must be, connected with, and subordinate to, a monthly meeting connected with, and subordinate to, a quarterly meeting, which is connected with and subordinate to, that yearly meeting. There can be no preparative meeting within those bounds, which is not so connected and subordinate. From this constitutional principle, the following rule results as a corollary. Every preparative meeting within those bounds, which is, through and by its appropriate links, connected with, and subordinate to, the yearly meeting of Philadelphia, is a "preparative meeting of the people called Quakers;" and any preparative meeting or assemblage of persons calling themselves a preparative meeting, not thus connected and subordinate, is not a preparative meeting of that people.

In laying down these propositions, I expressly avoid, and do not propose to examine or decide, unless in the sequel I find it necessary, a question much agitated and discussed, whether a preparative meeting can be laid down without its consent. There is, however, another proposition connected therewith, which, so as to make use of it hereafter, if necessary, I shall state barely, without a protracted or tedious inquiry, because I believe no one will gainsay it. A preparative meeting, cannot be made or constituted within the bounds of its superior, the quarterly; or to speak more definitely, a new preparative meeting

cannot be set up, within the bounds of the Burlington quarterly meeting, without the sanction of the latter body; that is to say, of the Burlington quarterly meeting, which is connected with, and subordinate to, the yearly meeting of Philadelphia. I avoid, for the present at least, another topic, or rather, I mean, in the propositions above stated, to express no opinion upon it, whether a superior meeting may control an inferior, in matters of property, or of a pecuniary nature; and also, another topic somewhat discussed in the examination of the witnesses, if not by the counsel on the argument, whether a superior meeting can, without appeal, reverse the decision of an inferior, or take cognizance directly and originally, of matters not coming, by way of appeal, through the subordinate meetings.

The general doctrine of the connection and subordination of meetings for business, I shall now proceed to show, has been expressly applied to the preparative meeting of Chesterfield. And as this topic bears much upon the result of our inquiries, I must enter into some detail.

Joseph Hendrickson, in his answer, says, "There have been for many years past, a monthly and preparative meeting of the said society of Friends of Chesterfield . . . at Crosswicks: . . . that the said meeting at Crosswicks, is under the control and jurisdiction of the said yearly meeting of Philadelphia: . . . that some of the members of a number of quarterly and monthly meetings, which were under the control and jurisdiction of the regular and constitutional yearly meeting, at Philadelphia, aforesaid . . . met at Philadelphia, on the third Monday in October, 1827, and then and there irregularly, and contrary to discipline, . . . formed a new yearly meeting of their own, which was adjourned by them to the second Monday of April, 1828; just one week before the time of the sitting of the regular constitutional yearly meeting: . . . that these religious dissensions and divisions found their way into the meeting of the society of Friends at Crosswicks, aforesaid: . . . that the Hicksite party, and Orthodox party . . . there, hold separate and distinct meetings, for business and worship, the former being under the jurisdiction and control of the new yearly meeting of Philadelphia, aforesaid, to which they have attached themselves, having renounced the jurisdic-

tion and control of the ancient yearly meeting aforesaid; the latter, being under the jurisdiction and control of the ancient yearly meeting." Stacy Decow, in his answer, says, "that for many years, there has been established, at Crosswicks, . . . a preparative meeting of the religious society of Friends, or people called Quakers, called and known by the name of the Chesterfield preparative meeting of Friends, held at Crosswicks. There is also a monthly meeting of Friends established at the same place. That this defendant is now, and has been for twenty years and upwards, a member of the said several meetings: . . . that the said Chesterfield preparative meeting of Friends at Crosswicks, to which he belongs, is the same preparative meeting of Friends at Crosswicks, under whose care the said school fund was placed: . . . that the said Chesterfield preparative meeting of Friends at Crosswicks, of which this defendant is a member, holds communication with the yearly meeting of Friends established in Philadelphia, which the said Joseph Hendrickson, in his original bill, improperly calls the Hicksite party, . . . and which yearly meeting, this defendant insists, is the yearly meeting of the ancient and true society of Friends. He denies that the society of Friends to which he belongs, have seceded from the faith, the religious institutions or government of the ancient and religious society of Friends, or from the ancient legitimate yearly meeting at Philadelphia; but the time of holding it has been changed from the third second day in the fourth month, to the second second day of the same, . . . there being no constitutional time for the assembling of the yearly meeting, the time of holding it was changed to the time it is now held. . . . The said yearly meeting assembled again on the said second second day in the fourth month, 1828, and is now settled on its ancient foundations and principles. This defendant, therefore, denies that it is a new yearly meeting within the pale of one already in existence."

The testimony on this subject, of some of the witnesses, is to the following effect. *John Gummere*, 1 *vol. Evid.* 315: "Burlington monthly meeting, is a subordinate branch of Burlington quarterly meeting, which quarter is subordinate to the Philadelphia yearly meeting." *Ibid*, 318: "That yearly meeting . . . is

held annually, on the third second day of the fourth month, at Arch street meeting-house, in Philadelphia." *Samuel Craft*, 1 vol. *Evid.* 334, says, "From my earliest recollection, I have been a member of Burlington quarterly meeting, and for about thirty-six years past, I have been a member of Chesterfield monthly meeting. This monthly and quarterly meeting now are, and have been during all that period, subordinate branches of Philadelphia yearly meeting, held for many years past in the meeting house on Arch street, on the third second day in the fourth month, annually." *Josiah Gaskill*, 2 vol. *Evid.* 297, says, "The monthly meeting which I am a member of, does consider itself members of Burlington quarterly meeting, which considers itself members of the yearly meeting of Friends held in Philadelphia, on the second second day of fourth month, at Green street." *Ibid*, 301: "The Burlington quarterly meeting . . . held at Chesterfield . . . have sent representatives to the yearly meeting of Friends held in Philadelphia in fourth month, ever since . . . the second second day in fourth month . . . at Green street, instead of Arch street. The yearly meeting at Green street I consider the yearly meeting of Friends . . . and because it is the same yearly meeting which, prior to 1827, had been held in Arch street." *James Brown* 2 vol, *Evid.* 321, says, "These quarterly, monthly, and preparative meetings, are but parts of the one great whole, the yearly meeting . . . . The Chesterfield monthly and preparative meetings were component parts of the Burlington quarterly meeting. The Burlington quarterly meeting was a branch of the yearly meeting, which, in fourth month, 1827, was, and for many years before had been, held in Arch street, Philadelphia." . . . He "attended most part of the yearly meeting in Arch street, 1827, as a member of the society, and belonging to Chesterfield monthly meeting." *Ibid*, 322: "We have not attached ourselves, as I apprehend, to any other yearly meeting than the yearly meeting of Philadelphia, that is reorganized, and held on the second second day in fourth month, annually . . . . We do not consider ourselves members of the yearly meeting held there (in Arch street) since 1827." "That portion of the Chesterfield preparative meeting which . . . continues to hold that meeting at the usual time and places;" (that is to

say, the preparative meeting whereby Decow was appointed treasurer of the school fund, as is elsewhere shown and expressed,) "acknowledge themselves, or claim to be, a part of the monthly meeting which . . . still continues a member of the Green street yearly meeting." The testimony of the last witness, James Brown, demands peculiar attention, from the station he held, as clerk of the preparative meeting of which Decow is a member, and from the confidence reposed in that officer by the usages of the society, and the intimate knowledge he must acquire and possess of the acts, connections, and sentiments of the meeting.

It thus appears, there were and are two distinct bodies, each claiming to be the Chesterfield preparative meeting of Friends at Crosswicks, and each claiming to be the same meeting under whose care the school fund was placed, and yet, *de jure*, remains. I stop here a moment, to fix the time when these bodies were distinctly and separately organized, in order to ascertain whether it was before the appointment of Decow as treasurer of the school fund. And on account of the connection, it may be useful to look also to the higher meetings. The separation in the Burlington quarterly meeting, appears to have occurred in the eleventh month, 1827. *Samuel Emlen*, 1 vol. *Evid.* 325; *Josiah Gaskill*, 2 vol. *Evid.* 301; *Charles Stokes*, 2 vol. *Evid.* 207. The latter witness says, he "attended the Burlington quarterly meeting in the eleventh month, 1827. At that meeting a separation did take place." And in answer (229) to this question, "After the separation of which you have spoken, in 1827, did your quarterly meeting consider itself as a constituent branch of the yearly meeting held at Arch street, Philadelphia, on the third second day of fourth month?" he answered, "The quarterly meeting considered itself a constituent branch of the yearly meeting of Philadelphia, which had been held some years previously at the Arch street house, on the third second day of fourth month; but which, owing to the circumstances which had grown out of the unsettled and divided state of society, it was concluded should be held on the second second day of fourth month."

The separation in the monthly meeting of Chesterfield, or the

session of two distinct bodies, and the transaction of business separately by these bodies, took place as early as ninth or tenth month, 1827. *Samuel Emlen*, 1 vol. *Evid.* 324, 328, 331; *Samuel Craft*, 1 vol. *Evid.* 336, 337; *Josiah Gaskill*, 2 vol. *Evid.* 284. He fixes the time, the tenth month, 1827, and says, "There did a separation take place in Chesterfield monthly meeting in that month." He farther states, (296,) that the Chesterfield monthly meeting with which he was united, did, at their meeting in that month, appoint representatives on behalf of that meeting, to attend the contemplated yearly meeting to be held in Philadelphia, in that same month; and in this respect he is fully supported by the book of minutes, which is before us as an exhibit: and he farther testifies, that the representatives, with one exception, attended the yearly meeting in the tenth month, 1827.

The separation in the preparative meeting of Chesterfield, bears date in the twelfth month, 1827. *Samuel Emlen*, 1 vol. *Evid.* 325; *Samuel Craft*, 1 vol. *Evid.* 339, 347; *Josiah Gaskill*, 2 vol. *Evid.* 286. The latter witness says, (287,) that after those who separated left the preparative meeting, the meeting proceeded in first month, 1828, to appoint trustees of the school fund, and that Decow was appointed treasurer at the same meeting. The testimony of James Brown is very explicit and satisfactory on this topic, and its importance, from the station he held as clerk of the meeting, has been already suggested. He says, 2 vol. *Evid.* 323, that the appointment of Stacy Decow as treasurer of the school fund, was made after the time when the separation of the preparative meeting of Chesterfield into two bodies or meetings, each calling themselves the Chesterfield preparative meeting, took place.

It thus clearly appears, that before the appointment of Decow as treasurer, there were formed and existed, two distinct bodies, claiming to be the Chesterfield preparative meeting of Friends; one of them connected with a body calling itself the ancient yearly meeting of Friends of Philadelphia, which holds its sessions on the third second day of April, in a meeting-house on Arch street; and the other, and by which Decow was appointed, which disclaims all connection with the above mentioned

yearly meeting, is connected with another body calling itself the ancient yearly meeting of Friends of Philadelphia, which holds its sessions on the second second day of April, in a meeting-house on Green street. It also appears there are two separate bodies, styling themselves and claiming to be, the ancient and constitutional yearly meeting of Friends of Philadelphia. There is, however, and there can be, as is asserted and admitted by all, but one ancient yearly meeting, and but one body entitled to that appellation. This truth is distinctly admitted by the pleadings of the parties; it is plainly asserted by the book of discipline, which all who claim to be of the society of Friends, as do all the parties, and if my memory is correct, all the witnesses, in the cause, unqualifiedly admit to be their standard and their guide; and it is testified by several of the witnesses, whose depositions I have already noticed; to which may be added that of Halliday Jackson, an intelligent and well informed witness examined on the part of Decow: 2 vol. *Evid.* 155.

We are now brought to the inquiry, which of these two bodies or meetings is the ancient yearly meeting of Friends of Philadelphia? an inquiry, which, if I may judge from my own feelings and reflections, is of the deepest interest and importance. There is, and can be, but one Chesterfield preparative meeting of the society of Friends. There is, and can be, but one yearly meeting. A preparative meeting must be connected with the yearly meeting of Philadelphia, and without such connection, no assemblage is a preparative meeting. One of these bodies, or preparative meetings, is connected with the one, and the other with the other of the yearly meetings. Which, then, is the yearly meeting? Or, to confine our inquiry within the only requisite range, is the meeting or body assembling on the second second day of the fourth month, at Green street, the ancient yearly meeting? If it is, Decow is the treasurer. If not, as I have already shown, Hendrickson, once the acknowledged treasurer and the obligee, named as such in the bond, is entitled to the money. When such consequences hang on this question, may I not call it interesting and important? May I not stand excused, if I approach it with great anxiety and deep solicitude?

In the latter part of the seventeenth century, and at a very early period in the progress of the settlement of New-Jersey and Pennsylvania, the number and condition of the followers of George Fox, or the people called Quakers, rendered it desirable they should be brought under a common head, according to the form of ecclesiastical government adopted in England, and already existing in some of the more ancient colonies. In the year 1681 or 1685, (the precise time seems to be controverted, and cannot influence our present pursuits,) a yearly meeting was established, comprehending the provinces of New-Jersey and Pennsylvania, and the members of that religious society and their already organized meetings and judicatories of inferior grades. This body was not a mere incidental, casual, disconnected assemblage, convening without previous arrangement, ceasing to exist when its members separated, and formed anew when individuals came together again at some subsequent time. It was a regularly organized and established body, holding stated sessions, corresponding with other bodies of the same religious denomination, consulting together for the welfare of a portion of their church and its members, the ultimate arbiter of all differences, and the common head and governor of all belonging to the society of Friends, within its jurisdiction, which extended over the territories just mentioned, while they were called provinces, and since they assumed the name and rank of states. The meetings of this body were held annually, as its name imports, and as long and steady usage has wrought into a part of its essential structure. The time and place of convention are subject to its control, and have, accordingly, in several instances, been fixed and altered by it. The time and place, however, when and where only the body can constitutionally assemble and act, must, when fixed, so remain, until "the voice of the body," "in a yearly meeting capacity," which alone has the power and right "to govern its own proceedings," shall resolve on and enact a change. Such is certainly the rule of constitutional law, as applicable to this body; and such was their own practical construction of it, in the year 1798, when in the consciencious discharge of duty, they assembled, undeterred by the ravages of pestilence and the arrows of death. From the year 1685, for nearly a

century and a half, this body held its periodical sessions; for years, alternately at Burlington and Philadelphia, and finally in the latter city alone; and there, successively, at their houses on Pine street, on Keyes' alley, and on Arch street. Changes in time and place have occurred; but always by a previous resolve, by "the voice of that body," "in a yearly meeting capacity." In 1811, the place was fixed in the meeting-house on Arch street. In 1798, the time was changed to the third second-day of the fourth month of each year; and by the book of discipline, promulged by the yearly meeting in 1806, and as already observed, the acknowledged constitution of this religious community, the latter day is declared the period for its convention. No other day is mentioned; no other day is provided for under any circumstances; nor is any occasional, intermediate, or special meeting authorized.

In the year 1826, at the prescribed time and place, a meeting was held. After the transaction of its business, it adjourned, according to the ancient and wonted form, "to meet in the next year at the usual time." This body, thus convened and thus adjourned, was, without dispute, the Philadelphia yearly meeting of Friends. On the third second-day of April, 1827, at the house on Arch street, the designated time and place, a meeting assembled. It was composed of the representatives from the several quarterly meetings, and of all such individuals as inclination or duty had brought together. The regular constituent parts were there. Those who are since so openly divided by name, perhaps by feeling, peradventure by principles, then sat down together; one in form, if not in spirit; in unity of body, if not of mind. The clerk of the preceding year, according to ancient rule, opened the meeting in due order; for however simple, there was, nevertheless, an established ceremony. The representatives were called, certificates of visiting strangers were received, epistles from corresponding bodies were read, committees were arranged, the usual affairs of the occasion were transacted in unity and peace. The representatives were, in wonted manner, desired to abide for the next step in the progress of business. This body thus convened, was assuredly the yearly meeting; and up to the close of the forenoon, it sustained its consti-

tutional existence. If that assemblage ceased to be the Philadelphia yearly meeting, something which occurred subsequent to the close of the first sitting must have wrought out that result.

Such result was produced, say the defendant, Decow, and the meeting whereby he was appointed treasurer. This body ceased to be the yearly meeting of Friends, was dissolved, broken up "into its individual elements," (*Abraham Lower*, 1 vol. *Evid.* 421,) and reorganized in the ensuing autumn, in the yearly meeting which assembled in Green street, which became invested with the constitutional powers and rights incident to the Philadelphia yearly meeting, and the successor, or rather the continuance of the same body, which had been formed in the seventeenth century, at Burlington, and had from thence conducted and governed the affairs of the society, and connected with itself the subordinate meetings, and this whole religious community.

Our next duty, then, is to examine the causes which are alleged to have deprived this body of constitutional existence. And these are, first, the acts of the body in a collective capacity; second, the omission of the body to perform certain collective duties; and, third, the designs, plans, views, feelings and acts of individual members. Under one or other of these is comprehended, it is believed, every operating cause suggested in the pleadings, in the testimony of the witnesses, and in the arguments of the counsel.

The only acts alleged against the body in a collective capacity, are two in number. First, the appointment of a clerk of the meeting; and secondly, the appointment, near the close of the session, of a committee to visit the subordinate meetings.

*First*, The appointment of clerk to the meeting. To regard the act against which this complaint is directed, *as the appointment of a clerk*, is an entire misapprehension. It was, in truth, no more than the continuance in office of the former clerk; and as it seems to me, so far from an act of the body in its collective capacity, in violation of any rule, it was a strict, and under the circumstances in which the meeting was placed, an unavoidable compliance with, and adherence to, the ancient custom and order of the society.

According thereto, the nomination of clerk is to be made, not

in or by the meeting at large, but by the representatives, as they are called, or in other words, the persons deputed by the several quarterly meetings to attend, not merely as individuals, but as the organs of those meetings, in their official character.

The representatives, pursuant to the request already mentioned, remained at the close of the forenoon session, to discharge this duty. It is not my purpose to inquire into, or relate in detail, what passed among them. In the result, they could not agree, or did not agree, on the names of any persons to be proposed for the offices of clerk and assistant; and a report to this effect was made to the yearly meeting, when it opened in the afternoon. No nomination was offered. Put, now, the case in the strongest view; suppose the representatives had wantonly, or in neglect of their trust, omitted to propose names to the meeting? Was all further proceeding at an end? Was the meeting closed? The Book of Discipline, it is true, prescribes no guide or directory under such circumstances. But ancient custom, founded on the obvious dictates of reason, had established in this respect an operative law. The clerk and his assistant, of the preceding year, were to act, and without any new appointment or induction, were authorized to continue to discharge their appropriate functions, until the names of other persons were regularly brought forward, and united with, or in other words, appointed. In accordance therewith, and in view of the condition of the meeting, and of the difficulty which existed, an aged member (William Jackson) who had attended more than sixty years, and had thus acquired experience, perhaps, beyond any individual of the assembly, rose and stated, that "it had been always the practice for the old clerks to serve until new ones were appointed;" and he proposed to the meeting, "that the present clerks should be continued for that year." (*Thomas Evans*, 1 vol. *Evid.* 265.) Some difference of opinion occurred and was expressed, as to the course most eligible to be pursued. Some persons wished to refer the subject again to the representatives, for farther consideration. "Several of the representatives gave it as their opinion, there would be no advantage in so referring it, as there was not the smallest probability that they could agree. The first person who expressed this opinion, was one of

those who have since" united with the meeting in Green street; "and he added, that although he should have been in favor of a change in the clerk, if it could have been satisfactorily accomplished, yet as that was not likely to be the case, he thought the meeting had better proceed with its business. Several others of the same party expressed similar sentiments. Meanwhile a considerable number of those" who remain attached to the Arch street meeting, "expressed their approbation of the continuance of the present clerks, and a minute *desiring the old clerks to continue to serve the meeting*," (*Samuel Bettle*, 1 vol. *Evid.* 68,) was made and read. "On the reading of the minute, some of those who" now belong to the Green street meeting, "still continued to object, when one of their number remarked, he believed it was the best thing the meeting could do, under all the circumstances, and advised them to submit to it, as he did not think it would make so much difference to them, as some of them might imagine. Similar sentiments were expressed by one or two others of that party, and all objections to the appointment having ceased, John Comly, the assistant clerk, was requested to come to the table. He did not immediately do so, nor until several of his friends expressed that they thought that the business of the meeting had better go forward." The usual business then proceeded. This view, is chiefly extracted from the testimony of Thomas Evans. It is fully sustained by the depositions of Samuel Bettle and Joseph Whitall, and is, in no material point, impugned by any contradictory evidence. Some other witnesses, who speak of these transactions, are not so full and minute in detail, and some, it is to be regretted, do not recollect the occurrences of very interesting moments; as, for example, one of them, speaking of the afternoon of the first day, and having related some of the events, added, "The meeting proceeded on that afternoon: I don't remember particularly what took place:" *Halliday Jackson*, 2 vol. *Evid.* 54. In their opinions, in their inferences, in their feelings, we observe, as might be expected, a difference among the witnesses, but it is pleasing to meet with no such collision of facts, as to render necessary the delicate and arduous duty of weighing and comparing evidence.

It is, however, said, the greater number of the representatives wished to release the former clerk, and to nominate another in his stead; that a proposal was made to take their sense by a vote; and that this measure, which would have resulted in a majority for a new clerk, was prevented and defeated by the conduct of those who sought to retain the services of the former officer.

One of the peculiar and distinguishing characteristics of this people, consists in their mode of transacting business and arriving at conclusions; in which, rejecting totally the principle that a majority, as such, is to rule, or decide, or govern, they arrive at an unity of resolution and action, in a mode peculiar to themselves, and entirely different from that common to all civil or political, and to most ecclesiastical bodies. They look and wait for an union of mind; and the result is produced, not by a vote or count of numbers, but by an yielding up of opinions, a deference for the judgment of each other, and an acquiescence or submission to the measure proposed. Where a division of sentiment occurs, the matter is postponed for farther consideration, or withdrawn or dismissed entirely; or, after sometimes a temperate discussion, and sometimes a silent deliberation, those who support, or those who oppose a measure, acquiesce in the sense of the meeting as collected and minuted by the clerk; and they believe the "spirit of truth," when the meeting is "rightly gathered," will be transfused through their minds, and they will be guided and influenced "by a wisdom and judgment better than their own," and that their clerk will be led to act under "the overshadowing of that power, which is not at his command, and which will enable him to make proper decisions." One of the witnesses examined on the part of Decow, informs us, the clerk "collects, not by an actual count of numbers, or recording the yeas and nays, yet by an estimate of the prevailing sense, which the meeting, after discussion, usually settles with sufficient distinctness, one way or the other:" *Charles Stokes*, 2 vol. *Evid.* 249. The account given by Clarkson, in his Portraiture of Quakerism, is represented to be correct, although never expressly recognized by the society. "When a subject is brought before them, it is canvassed to the exclusion of all extraneous matter, till some

conclusion results; the clerk of the meeting then draws up a minute, containing, as nearly as he can collect, the substance of this conclusion; this minute is then read aloud to the auditory, and either stands or undergoes an alteration, as appears by the silence or discussion upon it, to be the sense of the meeting; when fully agreed upon, it stands ready to be recorded:" 1 *Clarkson's Portrait. Quak.* 157. The world at large, and especially those who have not closely observed the practical operation of these principles, in the peace and harmony and prosperity of the internal affairs of this religious community, may be strongly inclined to call in question their expediency. A republican spirit may see no just rule, but in the voice of a majority. A jealousy of power may suspect too much confidence in the fairness and candor of the clerk. But the conclusive answer to all such suggestions and suspicions is, that they are free to act as their judgments and consciences may dictate. We are not to interfere with their church government any more than with their modes of faith and worship. We are to respect their institutions, and to sustain them. Nor can any individual be hereby aggrieved. He is under no restraint to remain among them. Whenever he is persuaded that either their faith or their practice, does not accord with his own views of reason and scripture, he is at liberty to leave them, and to seek elsewhere, more purity, more spirituality, more christian and scripture order, more safety, more republicanism, or more peace. The constitution of this society neither recognizes nor makes provision for a vote, or a decision on the principle of numbers, in any instance or predicament. The minutes and journals of the various meetings, not merely within the bounds of this yearly meeting, but within the pale of the whole society, do not furnish, so far as we are able to learn, a ingle record of a vote taken, or a count of numbers. The instances of reports made by the major part of committees, form no exception to the universality of this rule of action. Nor do the few, I say few emphatically, compared with the myriads of decisions standing on their records, nor do the few minutes, which industry has gleaned up, of expressions like these: "the greatest part of Friends think it best," or "it appears to be the most general sense," serve to show that a vote was taken, or that

numbers, as such, prevailed, or that the minor part did not freely relinquish their views, and cordially acquiesce in those of the greater part. Let us, for example, look to the minutes of Chesterfield monthly meeting, of sixth month, 1691, because it is of Chesterfield, and of very ancient date. "The building of the meeting houses being taken into consideration, a meeting house on this side is generally agreed upon to be built, and the greatest part of Friends think it best to have it at the grave yard." Here is no allusion to a vote, nor any thing to indicate that all did not acquiesce in what the greatest part thought best. Barclay, in his treatise on Church government, gives the following explanation, and most pointedly condemns the rule of the greatest number. "The only proper judge of controversies in the church, is the spirit of God; and the power of deciding lies solely in it, as having the only unerring, infallible and certain judgment belonging to it; which infallibility is not necessarily annexed to any persons, person or place, whatever, by virtue of any office, place or station any one may have, or have had, in the body of Christ; that is to say, that any have ground to reason thus, because I am, or have been, such an eminent member, therefore my judgment is infallible, or because we are the greatest number:" *Barclay on Church Government*, 78. Hence then, I think, we are not called to inquire how far the allegation as to the relative numbers of the representatives, is correct, and we may justly dismiss from farther consideration, the objection that the old clerk would not have received a majority of votes. The very proposal to take a vote, was an overture to depart, and the consummation of it would have been a departure, from an ancient and unvarying practice, which had not only grown up to an overshadowing tree, but had its root in religious faith, and was nourished and sustained by religious feeling.

The inquiry, too, is of little importance, since, as I have shown, the omission of the representatives to agree in, and propose a nomination, only resulted in a continuance of the former officers, and did neither abridge, impair or destroy, the power of the meeting to provide for collecting and recording their acts and proceedings.

Let us, then, return to the yearly meeting. Here again, it is

said, a majority was opposed to the farther service of the former clerk, and his continuance contrary to their will, was not only an oppression of the few over the many, but was in fact a dissolution of the body. I am not able to say, from the evidence, if in any wise material, that even at the outset, this continuance was inconsistent with the wishes of the greater part of the meeting. But if such were the truth, it is abundantly shown, there was an acquiescence in the measure, even if an unwilling one. And this acquiescence was brought about by the agency and recommendation of some of those who are now the members of the rival yearly meeting. The following facts are stated by the witnesses. "A proposition came from a leading member." (*Joseph Whitall*, 1 vol. *Evid.* 218.) After the minute was read, "one of their number expressed his belief it was the best thing the meeting could do under all the circumstances, and advised them to submit to it:" *Thomas Evans*, 1 vol. *Evid.* 266. "One, and perhaps there were others, stated as their belief, it would be right, and encouraged his friends to accede to the proposition" for the continuance of the former clerks: *Joseph Whitall*, 1 vol. *Evid.* 217. "Efforts were made by persons, who have since" united with the Green street meeting, "to induce an acquiescence with the minute. At length, all opposition ceased:" *Samuel Bettle*, 1 vol. *Evid.* 69. Here, then, might have been opposition and dissatisfaction at the outset. But it is clear there was an ultimate acquiescence. And it is too much for any one, especially for those who took an active and influential part in bringing about this result, perhaps we may say, actually induced the peaceful result, to make it the subject of complaint, or to insist that the existence of the body was thereby destroyed.

There is another fact worthy of much consideration, in looking into the propriety of these proceedings; which is, that no person, save Samuel Bettle, the former clerk, was proposed for the office. The importance of this circumstance in civil affairs, is thus shown in the recent American treatise on the law of corporations. "Where a majority protest against the election of a proposed candidate, and do not propose any other candidate, the minority may elect the candidate proposed:" *Angell and Ames on Corp.* 67.

After all these events, I can have no hesitation in yielding to the entire and unqualified conviction, that the body remained in its pristine vigor, and proceeded to business as the Philadelphia yearly meeting of the society of Friends.

The other act, whereby, it is said, the discipline was violated, the society separated, and the constitutional existence of the yearly meeting destroyed, is the appointment of a committee to visit the subordinate meetings.

It would be very difficult, I think, to demonstrate, that an act of this nature, if not warranted by the discipline, or even if inconsistent with it, could work such sweeping results. The purpose and authority of this committee, were simply to visit, counsel and advise the inferior meetings, with no power, whatever, to act upon or control the rights or interests of any one, save by measures of persuasion. How far the temper or motive, which led to the appointment of this committee, may have been reprehensible, I shall examine under another head. It is to the act alone, that my attention is now directed; and the act itself, was in its nature, harmless. Let us, however, look more closely into the circumstances. They are thus represented by one of the witnesses. "A proposition was brought from the women's meeting . . . to appoint a committee to visit the quarterly and monthly meetings. This called forth a great deal of excitement, . . . and great opposition was made to it. Even some few of the Orthodox party themselves, did not, at first, appear to approve of it. But there were others of that party that strenuously urged the propriety of such a committee being appointed, and as they seemed to understand one another pretty well, apparently, they pretty soon united in urging the measure. It was, however, strongly opposed by much the larger part of the meeting; I cannot undertake to state the proportions, but I should think myself safe in saying, two-thirds of those that spoke. But it seemed all of no avail, . . . and having a clerk at the table subject entirely to the dictates of his party, he made a minute and took down the names of the committee that were offered to him. No Friend, I believe, undertook to mention a name:" *Halliday Jackson*, 2 vol. *Evid.* 56. Another witness gave the following representation:—"At the last sitting, on seventh day morning, a proposi-

tion was introduced from the women's meeting, to appoint a committee to visit the respective subordinate meetings, for their strength and encouragement. To this there was a decided objection made; some Friends then in the meeting and now attached to each of the parties, opposed it. The doubt of some was, that it had better not be decided at that time; with others, there was a decided opposition to the measure. At this juncture, a Friend stated to the meeting the out-door proceedings, the private meetings, and opened the whole subject. It appeared to me evidently to create uneasiness and alarm on the part of those who had been concerned in those meetings; some of them called in question the accuracy of the statement that had been made, and seemed disposed to deny it; some did deny it; others, however, said that the general statement was correct, and acknowledged it. The propriety of appointing a committee under such circumstances, appeared so very obvious, that the opposition, in a great measure, ceased for that time; after which there was a greater and more general expression of unity with the measure, than" the witness, a clerk of several years' experience, "had often, if ever, seen or heard." "I had," says the witness, "been watching the course of events, as clerk of the meeting, to know how to act; and when all opposition had ceased, and it was very apparent it was the sense of the meeting that the appointment should be made, I rose and stated that I had had my doubts, when this proposition was first brought in, whether it was expedient to adopt it at that time, but as the servant of the meeting, it being manifestly its sense, I should now proceed to make the minute, and accordingly made it, and united with them in their views; and a committee was appointed pursuant to the minute:" *Samuel Bettle*, 1 vol. *Evid.* 69. Whatever difference may be in these statements, as to matters of opinion; whatever suspicions may have been enkindled; whatever motives or designs may be imputed, here is no substantial discrepancy as to points of fact.

Was, then, the appointment of such a committee a novel, and therefore an alarming occurrence? More than one witness testifies, and no one denies, that it was an ancient custom of the society: *Samuel Bettle*, 1 vol. *Evid.* 70; *Halliday Jackson*,

2 vol. *Evid.* 133. Had the meeting power to make such appointment? Aside of the multitude of unquestioned precedents, a witness says, "during the discussion of the proposition, there was no suggestion of a doubt of the right and power of the yearly meeting to appoint such committee; the difference of opinion was confined to the expediency of making the appointment at that time:" *Samuel Bettle*, 1 vol. *Evid.* 70. Was the purpose of the appointment laudable? It was to advise and counsel the inferior meetings, in the language of one of the witnesses, "for their strength and encouragement." And if the design was to prevent schism and separation, the end was, surely, commendable; and if the measures taken to attain it, were otherwise, the censure should rest on the committee, the agents, and not on the meeting, the constituents. Was partiality exercised by the clerk, or any other person, in the selection of the committee? No name which was proposed was rejected. Was there opposition to the appointment? Strong and decided at the outset. Was there, at length, an acquiescence? "A greater and more general expression of unity than usual," says one witness. "The opposition pretty generally, if not altogether ceasing," says another witness, "the meeting proceeded to appoint:" *Joseph Whitall*, 1 vol. *Evid.* 218. Another says, "As all opposition ceased, a minute was made, and the committee appointed:" *Thomas Evans*, 1 vol. *Evid.* 268. These matters of fact, are, I believe, uncontradicted. One of the witnesses, indeed, intimates, that the clerk made the minute, being subject entirely to the dictates of his own party. But the clerk himself, whose veracity and candor are not only above reproach, but beyond suspicion, and who surely best knew his own motive of action, says, that though doubting at first the expediency of the measure, he made the minute, as the servant of the meeting, and because it was manifestly their sense that the appointment should take place.

Upon a careful examination of this measure, I can see nothing, either in the act itself, or in the manner of its inception, progress or adoption, subversive, in the slightest degree, of usage or discipline, and least of all, any thing of such vital influence as to break asunder the bonds of union, disfranchise the meeting, deprive it of constitutional existence, disrobe it of ability farther to execute

its ancient and appropriate functions, or to release from their allegiance all those who previously owed fealty and submission to it.

These, then, are all the overt acts of the meeting, which have been made the subject of complaint. It would, however, be a great error to suppose, that a session of five or six days was spent in these matters alone. Much other important business was transacted; all, I believe, it may be said, of the usual stated duties were discharged. Halliday Jackson gives the following brief but satisfactory account of what was done. "The business of the yearly meeting was proceeded in; and the usual subjects that occupy that body, such as considering the state of the society from the answers to the queries that are brought up from the different quarterly meetings in their reports; the reading of the minutes of the meeting for sufferings; reading reports from the committee who stood charged with Westown school, and some other matters; which occupied the meeting through the week;" 2 vol. *Evid.* 55. Another witness says, "All the business usually transacted at a yearly meeting, was gone through with, and several acts consummated, which no other body than the yearly meeting of Philadelphia was competent to perform:" *Thomas Evans*, 1 vol. *Evid.* 267.

Having thus reviewed what was done, we are now to turn our attention to what was not done by the meeting; for the latter, as well as the former, has been urged as an act of separation and disfranchisement of the yearly meeting.

Certain subjects, regularly brought before that body, were not acted upon, but postponed. "When the reports," says one of the witnesses, "were taken, or the subjects contained in the reports, from the different quarterly meetings, which were considered as new matter; such as the account from the southern quarter respecting the meeting for sufferings, rejecting their representatives, and an application, I think, from Bucks quarter, respecting the manner of choosing representatives to constitute the meeting for sufferings, together with . . . two cases that came up from Philadelphia quarter . . . they were all put by, and not acted upon, except the matter in relation to Leonard Snowden's case which, if I remember right, was returned to the quarterly meeting. It

seemed to be pretty generally understood, that the meeting was not in a qualified state, owing to the interruptions to the harmony that had taken place, to enter upon the investigation, or more properly, the consideration of these subjects:" *Halliday Jackson*, 2 vol. *Evid.* 55. It should be observed in general, that these subjects were not the regular stated business of the meeting, but occasional or special. In this remark, I do not mean to deny or detract from their importance, or the propriety of their having, at a suitable season, the most careful attention; but simply to show their real nature and character; and that to act on or omit them could not touch any vital part of the constitution of this body. A much more important consideration is, that the disposition of these subjects, the course which was adopted and pursued in respect to them, was the united act, and according to the common wish, of all parties, of even those by whom, or through whose instrumentality, they were brought before the meeting. This important fact is denied by no witness, and is expressly declared by more than one. The statement of one I have just now given. Farther being asked, if the subject from the southern quarter was not dismissed at the suggestion of Robert Moore, a member from that quarter, he answered, "When that subject was brought before the yearly meeting, it was drawing towards the close of the week, and by that time it was evident the yearly meeting was not in a qualified state to act upon any important subject; and therefore, that subject, as well as two others, were dismissed without being much urged by Friends. I have not a clear recollection, but it seems to me that Robert Moore did say something about that subject from the southern quarter." Being asked if the subjects from Bucks and Abington were not dismissed at the instance of John Comly, he answered, "I have no recollection of who spoke first on the subject. John Comly was sensible of the state the yearly meeting was in; and I can state what I have frequently heard John Comly say, that Samuel Bettle first suggested to him the propriety of having those subjects dismissed, all those subjects that came up in the reports, and wished John Comly to use his influence with his friends to have those subjects from Bucks and Abington dismissed, and he, Samuel Bettle, would use his influence with his

friends to have that subject passed over that was coming up from Philadelphia quarter; which subjects, it was apprehended, would produce a great deal of excitement in the yearly meeting, and which Samuel Bettle feared the consequences of; but how far that influenced John Comly in favor of putting off those subjects, I cannot say:" *Halliday Jackson*, 2 vol. *Evid.* 132. Another witness, Abraham Lower, being asked whether the propositions from Bucks and the southern quarter, were not disposed of at the instance of members from those quarters, respectively, and who, since the separation, have joined that portion of the society with which he was in unity, answered, "I have no recollection of the members of those quarters making such a proposition, but I should think it quite probable:" *Abraham Lower*, 1 vol. *Evid.* 392. And the same witness, in another place, testified, "As that yearly meeting was acknowledged, not qualified to enter upon the matters brought up from the quarters, that case, with others, was concluded not to be attended to:" *Abraham Lower*, 1 vol. *Evid.* 373. Samuel Bettle says he mentioned to John Comly, "Had you not better withdraw the propositions for a change, . . . coming from Bucks, Abington, and the southern quarter? He said he thought so too, united with me fully in that view, and said they had better be withdrawn, as it was not likely they would ever be adopted, and would only occasion confusion and difficulty. The propositions, when again brought before the meeting, were withdrawn by common consent:" *Samuel Bettle*, 1 vol. *Evid.* 69. Thomas Evans testifies thus: "Those subjects were all connected with, or had grown out of, the controversy respecting the doctrines of Elias Hicks; and as there was a general understanding that his friends were about to separate, and form a society of their own, those subjects were, at their suggestion, or by their consent, referred to the meetings from which they had come, or suspended:" *Thomas Evans*, 1 vol. *Evid.* 276. "In the disposition of these subjects, there was a united conclusion of the meeting, after as full an expression of opinion as is usual; and those that took part in this business, some of them now belong to the new meeting, and others remained with the old society, and participated with the delibe-

rations of the meeting which led to those conclusions:" *Samuel Bettle*, 1 vol. *Evid.* 87.

Thus, then, it appears, these omissions took place, certainly with the consent, and probably at the request, or upon the suggestion, of the very persons who now complain. Under such circumstances, this measure, by no means unusual—for Abraham Lower testified that he has known cases brought to the yearly meeting and laid over for the consideration of the next—does not afford ground for censure, much less for annihilation, and least of all on the objection of those who, if they did not actually bring it about, were consenting thereto.

But, it is said, the meeting was not in a qualified state to enter upon the consideration of these subjects. What then? Was this unqualified state peculiar to one portion, or common to all? Was the meeting thereby dissolved? If wonted harmony ceased to prevail; if the minds of the members had become so sensitive on particular points that the introduction of them would produce agitation and excitement, unfavorable to cool, deliberate and dispassionate investigation and decision, it was the part of prudence, of christian forbearance, of enlightened reason, of patience and meekness, and of that spirit of peace and submission which, may I not say without offence to others, so eminently characterizes this religious denomination, to wait in humble expectation of the overshadowing of that Power who can say, as well to the stormy passions of the human breast as to the torrent and the whirlwind, "Peace, be still." But if such a state of things be a dissolution, no human society can be held together, and attempts at order and government, instead of the means of curbing, and restraining, and controlling the wayward passions of man, do but afford him the opportunity of giving them extended and unbridled influence and action.

Besides these considerations, which are, I trust, sufficient conclusively to sustain the meeting in its constitutional existence, there are some others, founded on the acts and conduct of the members, and of the component parts of the society at large, or the subordinate meetings, which incontrovertibly evince the acknowledged existence of the meeting, and its direct recognition

as such, not only during its session, but after it had closed its services for the year.

John Comly, and I feel at liberty to refer to him, though an individual, from his eminent standing and distinguished character, both private and public, as a man and as a minister, as well as from the prominent part he bore in the transactions which attended the separation in this society,—John Comly acted throughout the meeting, from the commencement to the close, as its organ, as an officer of the yearly meeting of Philadelphia. He did, indeed, request to be excused from serving in that capacity. But the fact remains that he did serve, and the reasons he gave for being inclined to withdraw, strengthen the inferences to be deduced from the fact. Few men are, I believe, more distinguished for purity, candor, and every other virtue. Did he say, I cannot serve this meeting, because I am not lawfully and rightly appointed an assistant, and to act as such would be, in me, usurpation and oppression? Did he say, he had been recorded as assistant "in opposition to the voice of the larger part of the meeting?" Did he say, "the hedge was broken down," the meeting was disorganized, a revolution had occurred, there was no longer a yearly meeting, but the society was dissolved into its original elements? Halliday Jackson testifies thus: "The next morning, I believe, John Comly did not take his seat at the table at the opening of the meeting, as usual." In this particular, perhaps not a very important one, the witness afterwards corrected himself, and said he believed Comly took his seat at the table by the side of the clerk, when he first came into the meeting, (2 vol. *Evid.* 132,) "but soon after, he got up, and made a very forcible appeal to the yearly meeting. I think he regretted the state and dilemma into which the yearly meeting appeared to be brought; that there were two parties, evidently two parties, that appeared to be irreconcilable to each other, and therefore not qualified to proceed in the weighty concerns of a yearly meeting under those trying circumstances, and proposed that the yearly meeting might adjourn, and Friends endeavor to get cool and quiet in their minds, and that possibly they might be favored to come together again at some other time, and be more in the harmony. . . . And although John Comly expressed

his uneasiness at acting as assistant clerk, at the request of some of his friends, and some of the other party also, he submitted again to go to the table:" *H. Jackson*, 2 vol. *Evid.* 54. Other witnesses state the transaction, not differently though somewhat more fully. "On third day morning, immediately after the opening minute was read, John Comly rose and stated, that he had mentioned at the previous sitting, that he should go to the table in condescension to the views of his friends, and that it was in that feeling that he was now there; that the meeting was divided into two distinct and separate parties, and that under present circumstances those parties were irreconcilable; that each of these parties was striving for the mastery, and that if either of them gained the ascendancy, it must be to the grievance and oppression of the other. He therefore proposed that the meeting should suspend all further business, and adjourn; but if the meeting was resolved to proceed in its business, at all hazards, he could not conscienciously act as the organ of a meeting made up of such conflicting parties, and must therefore request to be permitted to retire. His proposal . . . was but feebly supported. . . . His party strongly objected to his leaving the table, urged his continuance, and that the meeting should now proceed with its business. John Comly then rose, and stated, that as he found the meeting was not prepared to adjourn, he was willing, after the usual expression of approbation, to determine the sense of the meeting on his remaining at the table, so to continue, and to proceed with the business:" *Thomas Evans*, 1 vol. *Evid.* 266. "He took his seat, prepared to act, and the business did progress, he acting as usual, without making any farther objection on his part:" *Samuel Bettle*, 1 vol. *Evid.* 69.

Having seen the conduct of this very active and very useful member, as he is called by one of the witnesses, (*Abraham Lower*, 1 vol. *Evid.* 392,) let us briefly advert to that of the other members of the meeting, who now belong to the meeting in Green street.

Their urgency that John Comly should act as assistant clerk, and that the business of the meeting should proceed, has just been mentioned. "The yearly meeting of 1827, was entirely conducted as it had been on previous occasions:" *Samuel Bet-*

*tle*, 1 vol. *Evid.* 94. "During that meeting, persons who have since joined the other meeting, were appointed on committees, and took an active part in the concerns of the meeting throughout:" *Ibid.* In the afternoon of the first day's meeting, some of the friends of John Comly "expressed, that they thought the business of the meeting had better go forward:" *Thomas Evans*, 1 vol. *Evid.* 266. "During all the remaining sittings of the yearly meeting, he (John Comly) and his friends continued their attendance, took part in its deliberations, assented or dissented from its conclusions, as opinion led them, and addressed it as the yearly meeting of Philadelphia:" *Thomas Evans*, 1 vol. *Evid.* 267. "During the last hour of the sitting, all the proceedings were read over, as is usual at the close of the yearly meeting; no objections were made by any one, to any part of the minutes; the concluding minute was also read, adjourning the meeting until the next year, at the usual time and place, if the Lord permit." This conclusion is the form common on such occasions. "After this minute was read, a considerable pause ensued; there was no objection made to it, and Friends separated from each other in the usual manner:" *Samuel Bettle*, 1 vol. *Evid.* 70; *Thomas Evans*, 1 vol. *Evid.* 268. "Those who have since" joined the Green street meeting, "were generally present at the time of the adjournment. The yearly meeting was as large and numerous at the last sitting, as at any sitting during the week:" *Joseph Whitall*, 1 vol. *Evid.* 218.

One of the transactions of this meeting deserves, in the present connection, particular notice. "There was one matter before the meeting which was of a humane and benevolent character, that Friends, perhaps, of both parties, were pretty much united in:" *Halliday Jackson*, 2 vol. *Evid.* 56. "That was to raise three thousand dollars to aid our brethren in North-Carolina, in removing out of that state many hundred colored people, eight or nine hundred of them at least, who were under the care of the Carolina yearly meeting, and whose liberties were in jeopardy, unless they removed out of the state. This sum it was proposed should be raised by the different quarterly meetings, in the usual proportions. This was entirely united with; not a single dissentient voice; a great many expressing their views, and a

minute was made, directing the quarterly meetings to raise the money and pay it to Elias Yarnall, the treasurer of the yearly meeting. The quarterly meetings that compose the yearly meeting, all assembled, and in conformity with the direction contained in the extract from the yearly meeting, raised their quotas of the three thousand dollars, and paid it to Elias Yarnall, the treasurer:" *Samuel Bettle,* 1 vol. *Evid.* 70. Chesterfield preparative meeting bore its wonted part. This transaction is of an unequivocal character. The resolve was an act, not of private or individual benevolence, but of the meeting in its collective capacity. The recommendation, by the extract, was such as that meeting alone could perform. All, we are told, united in it. Not a dissentient voice. It was received by the several quarterly meetings as an act of the yearly meeting, and carried into effect as such, and the moneys were transmitted to the treasurer; thereby making, after the close of the yearly meeting, a direct recognition of its existence and authority. The effect of these circumstances cannot be weakened by the "humane and benevolent character" of this work of charity. It was indeed proof of a noble and munificent spirit. But suppose the general assembly of the Presbyterian church, or the Protestant Episcopal convention, had sent missives or extracts to the quarterly meetings, enjoining the donation, and to make their treasurers the channels of conveyance, would the call have been obeyed?

I do not pause to answer, but proceed to the consideration of another of the heads into which this cause has been divided, the designs, plans, views, feelings and acts of individual members of the society; and under this head I shall notice, so far as I think it necessary, the conduct of subordinate meetings, and of what has been called the dominant party.

And here I make some general remarks, which indeed in my judgment, furnish an answer, a decisive answer, to many of the conclusions which have been drawn or suggested from the facts which, on these points of the case, appear in evidence.

*First.* Our concern is with the yearly meeting in its collective capacity. Our purpose is to ascertain whether that body holds or has ceased to hold, a legal existence; whether the body which met on Arch street, and continued and closed its session there, in

April, 1827, was the constitutional yearly meeting of the society? Whether the yearly meeting then assembled, performed its functions and adjourned? or whether that assemblage, at its opening, in its progress, or at its conclusion, ceased to be the ancient and legitimate yearly meeting? Whether the venerable edifice remained, or its place exhibited only a deplorable pile of ruins?

*Second.* As such, then, are our concern and purpose, we have little to do with the causes of division and separation, about which so much has been said and written in the course of this cause, or with the division and separation, except so far as they may operate on the legal existence of the assemblies of this society. A separation has, indeed, taken place. Those who formerly offered their sacrifices on a common altar, now no longer worship or commune together. Many who once went up to the ancient temple, have left it, and go up to another mount. They had the right to do so. Our civil and religious liberty, whereof we have such just reason for congratulation and gratitude, left them free from all restraint, save conscience and the divine law. We are not here to approve or condemn them, nor to inquire into their motives, nor to estimate their strength, or their purity, or their consistency with the light of truth, whereby all profess to be guided. I wish to judge no "man's servant. To his own master he standeth or falleth." I hope to be able to continue and close this investigation, without any inquiry into religious faith or opinions. Not that I doubt the power of this court. For while I utterly disclaim the idea that this court, or any court, or any human power, has a right to enforce a creed, or system of doctrine or belief, on any man, or to require him to assent to any prescribed system of doctrine, or to search out his belief for the purpose of restraining or punishing it in any temporal tribunal, I do most unqualifiedly assert and maintain the power and right of this court, and of every court in New-Jersey, to ascertain, by competent evidence, what are the religious principles of any man or set of men, when, as may frequently be the case, civil rights are thereon to depend, or thereby to be decided. In a greater or less degree it is done daily. Who avail themselves of it more frequently than the society of Friends, when, on the ground of

religious faith, they claim and enjoy an exemption from the use of an oath in our courts of justice? How far, then, this separation may have been proper, or whether the causes of it will stand the scrutiny, which, in the great day of account, they must undergo, we are not to resolve. Its effect on this society, and the ancient assembly, is the outermost bound of our inquiry.

*Third.* Inasmuch as our research properly, and almost exclusively, relates, as I have endeavored to show, to the yearly meeting in its collective capacity, it is of little worth to inquire into the plans, designs, or views of individuals, or even the acts of inferior bodies, since these, however incorrect, or hostile, or indefensible, can have no great influence on our main pursuit; for if individuals were ambitious, not lowly, arrogant, not humble, domineering, not submissive, and were destitute of the mild and forbearing spirit of christianity; if a party had sprung up, resolved, as was said, "to rule or to rend;" if even monthly or quarterly meetings had violated the wholesome rules of common discipline, it by no means follows that the bonds of the society were broken, their compact dissolved, their discipline at an end, their constitution destroyed, and their existence annihilated. Such a government is a mockery, a pretence. It has not the consistency of even the mist of the morning. The plain and irresistible truth, that such a government, so wholly unadapted to the condition of mankind, could not exist, abundantly proves that such principles are unsound. The basis of all government, is the truth taught by every page of history, that turbulent passions will arise, that acts of violence will be committed; and the purpose of government is to control, to regulate, to repress, to remedy such passions and conduct. If otherwise, the edifice is built of such stuff as dreams are made of, and is as unsubstantial and as little to be valued as a castle in the air. If the state of Georgia should disregard the decision of the federal judiciary, or even resist the executive power of the United States, is the constitution dissolved? If designs exist in South-Carolina "to rule or to rend," our government, surely, is not therefore annihilated. It may be said, these are but parts, small parts of the Union. Is it not in like manner said, the adherents of the

Arch street meeting are a minority, a small minority? Gough, in his history, makes this judicious and appropriate remark: "The independency claimed by the discontented party, is incompatible with the existence of society. Absolute independency in society being a contradiction in terms:" 3 *Gough's Hist.* 24.

This view of the subject would, I think, excuse any examination in detail; yet to see these principles in their practical application, as well as farther to illustrate the matter, and to leave, if possible, nothing without notice, which is urged as bearing on the result, I shall briefly advert to some of the prominent topics of dissatisfaction and complaint.

"The most prominent cause of" the division in the society, "of a public nature, I consider to be," says one of the witnesses, (*Abraham Lower*, 1 vol. *Evid.* 354,) "the public opposition or disrespect, manifested by the members of Pine street monthly meeting, by the agency and influence of Jonathan Evans, in breaking up the men's meeting, or closing it, whilst Elias Hicks was, with the consent and approbation of that monthly meeting, engaged in the women's department in the prosecution of his religious concern." The occurrence took place "between 1819 and 1821:" *Ibid.* Now, if a prominent member of that meeting was guilty of rudeness or impropriety, it is plain, that he should have been individually dealt with, brought to confess his error, or disowned. If the meeting, as such, acting from his example, or under his influence, were guilty of censurable disrespect, "such meeting ought" to have been required "to render an account thereof." I use, here, the words of the book of discipline, the meaning of which is well understood. But it is claiming too much to assert, that the society is thereby rent asunder, when no measures to punish the offenders were ineffectually essayed, when years have shed their healing influence over it; or that the religious rights and privileges of all the other meetings and members, within a large district of territory, have been jeoparded, and the subsequent sessions of the yearly meeting been unwarranted, and their acts usurpation and oppression.

Another complaint against individuals, and against the meeting for sufferings, is called "an insidious effort to palm a creed upon a society which never had a creed:" *Abraham Lower,*

1 vol. *Evid.* 369. The affair is thus represented by the witness who uses the expression I have quoted:—"The minds of some of the members of that meeting appeared to be anxious that something should be done to keep the minds of the members of the society from imbibing sentiments which seemed to be growing common among its members. The suggestion was made to get up a pamphlet, to be composed of extracts from the writings of our early Friends; and from what some of us saw of the disposition of those persons, who have since denominated themselves Orthodox, . . . we felt afraid that something was about to be got up, calculated to trammel our conscientious rights, and when the pamphlet was prepared, a small number of us expressed our dissatisfaction with the undertaking, and with the matter of the pamphlet, fearing, that in the hands of arbitrary men, a construction might be given to some of the views in that pamphlet, that would abridge the right of private judgment. . . . There were, I think, ten thousand of them printed, . . . but it was detained, not published. And when the minutes of the meeting for sufferings came to be read, as usual, in the yearly meeting, to my surprise, that pamphlet appeared to be recorded on the minutes, and when it was read, the yearly meeting appeared very much dissatisfied with it. It was proposed, and generally united with, and so expressed, that it should be expunged from the minutes of the meeting for sufferings. . . . It was finally left, with the conclusion that it should not be published. It was considered in the light of a creed, and that by this course of leaving it on the minutes of the meeting for sufferings . . . that when the minutes should be read in the yearly meeting, and that as a part of them, that it would be adopted by society, foisted upon them in that insidious way:" *Abraham Lower*, 1 vol. *Evid.* 368. On the other side, the following representation of this affair was made: "It has been the custom of the society, whenever any of its doctrines or testimonies are misrepresented in works that are published, to endeavor to induce the editors of those works to give the views that Friends hold in respect to the doctrines thus misrepresented. In the year 1822, there was a discussion in a public paper, printed at Wilmington, conducted under the signatures of Paul and Amicus; Paul attacking Friends, and Amicus

speaking in their behalf, and in a manner, too, which showed that he was speaking for the society, clearly. After this discussion had progressed for a considerable time, Amicus avowed doctrines, as part of the christian faith, which we could not accord with; they appeared to be of a socinian character, at least. These essays being about to be reprinted in form of a book, . . . the meeting for sufferings, in the regular order of their proceedings did . . . notice it, by appointing a committee. . . . The committee pursued the usual course, . . . prepared a statement of what were the views of Friends, . . . making extracts from various approved authors. The meeting united with the report of the committee, and made a minute on the subject. The editor did publish the minute in his paper, but declined saying any thing on the subject in his book. The meeting were under the necessity of publishing these extracts themselves, and did print an edition of it. In the yearly meeting of 1823, when the minutes of the meeting for sufferings were read, considerable objections were made to that part of the proceedings. . . . The excitement being considerable, the meeting adjourned until the next morning. When the meeting assembled the next morning, it was proposed that the extracts should be stricken off the minutes of the meeting for sufferings; objection was made to that, on the ground that it would be a disavowal of the doctrines held by Friends, these extracts being taken from the writings of approved Friends." . . . It was "proposed to them to avoid both difficulties, by simply suspending the publication, not taking it off the minutes, and not circulating the pamphlets, but leaving the subject. This proposition was finally acquiesced in, and the business so settled:" *Samuel Bettle*, 1 vol. *Evid.* 72. How far this explanation may serve to show that the measure was in conformity with ancient custom, and called for by the exigency of the occasion; or how far it was an insidious effort to impose a creed; or how far the fear was well founded that an attempt was made to trammel consciencious rights, or to abridge the right of private judgment, I shall not undertake to decide. It is enough to say, that if such a design existed, if such an effort was made, the design was frustrated, the effort was defeated; and the authors of it met with a just, though silent rebuke. But the attempt did not impair the

solidity of the yearly meeting to which it was proposed. I cannot believe that the proposal, by a committee of congress, of an unconstitutional or oppressive law, would annihilate that body, or abrogate the constitution. The wildest and most visionary theorists would not, I believe, venture on such bold and untenable ground.

This matter of religious faith and doctrine, of a creed, has directly or indirectly filled up a large portion of the volumes of evidence before us; was the subject of many remarks in the arguments of the counsel at the bar of this court; has been the cause of much anxiety and alarm; and misunderstandings in respect to it, have, I doubt not, had great influence in bringing about the lamented rupture in this most respectable society. I fear the matter has been greatly misunderstood, if not greatly misrepresented. This society has, and from the nature of things must have, its faith and doctrines, its distinguishing faith and doctrines. They would, unhesitatingly, repudiate the tenets of Confucius, of Bramah, or of Mohammed. They believe "in Christ and him crucified." They bear both public and private testimony of their faith. They have repeatedly declared it, and published it to the world. They have a confession of faith, and a catechism. A declaration of faith was issued on behalf of the society in the year 1693—was approved by the morning meeting of London, and published by the yearly meeting of Philadelphia, in or about 1730. It is, I suppose, the same which is to be found in Sewell's History, (2 vol. 472.) It purports to be "a declaration of what our christian belief and profession has been and is," and contains an exposition of belief, in respect to Jesus Christ, his suffering, death, and resurrection, and the general resurrection of the dead, and the final judgment. Sewell, (2 vol. 483,) gives what he calls "a confession of faith," which was, by George Whitehead and others, presented to parliament in December, 1693, and begins thus: "Be it known to all, that we sincerely believe and confess." The yearly meeting, as early as 1701, by their direction and at their expense, circulated Barclay's Apology, and his Catechism and Confession of Faith, as containing the doctrines and tenets of the society of Friends. What is a creed, but an exhibition of faith and doctrine? Why

then, should the tocsin now be sounded among a people, who, a well informed member tells us, have more frequently than any other religious community, exhibited to the world their principles and their faith? Were the early Friends less anxious for the cause of truth, less jealous of encroachment on their religious freedom, less willing to bear testimony against error and to suffer for their testimony, less prompt to discern insidious efforts, less fearful of attempts to trammel conscience or abridge the right of private judgment? The observations of Robert Barclay, in a treatise on church government, published under the sanction of the society, and several times printed by the yearly meeting of Philadelphia, (*Thomas Evans*, 1 vol. *Evid.* 304,) are fraught with so much good sense, practical wisdom, and genuine piety, that they cannot be too frequently pondered by all, of every name or sect, who feel an interest in the cause of religious truth and order. "Whether the church of Christ have power, in any cases that are matters of conscience, to give a positive sentence and decision, which may be obligatory upon believers. I answer affirmatively, she hath; and shall prove it in divers instances, both from scripture and reason; for, first, all principles and articles of faith which are held doctrinally, are, in respect to those that believe them, matters of conscience. . . . Now, I say, we being gathered into the belief of certain principles and doctrines, without any constraint or worldly respect, but by the mere force of truth on our understanding, and its power and influence upon our hearts, these principles and doctrines, and the practices necessarily depending upon them, are, as it were, the terms that have drawn us together, and the bond by which we became centered into one body and fellowship, and distinguished from others. Now, if any one or more, so engaged with us, should arise *to teach any other doctrine or doctrines*, contrary to these which were the ground of our being one, who can deny but the body hath power, in such a case, to declare, *this is not according to the truth we profess*, and, therefore, we pronounce *such and such doctrines to be wrong*, with which we cannot have unity, nor yet any more spiritual fellowship with those that hold them. . . . Now, this cannot be accounted tyranny and oppression. . . . Were such a principle to be received or believed, that

in the church of Christ no man should be separated from, no man condemned or excluded the fellowship and communion of the body, for his judgment or opinions *in matters of faith*, then what blasphemies so horrid, what heresies so damnable, what doctrines of devils, but might harbor itself in the church of Christ? What need then of sound doctrine, if no doctrine make unsound? . . . Where a people are gathered into the belief of the *principles and doctrines* of the gospel of Christ, if any of that people shall go from their principles, and assert things false, and *contrary to what they have already received*, such as stand and abide firm in the faith have power . . . to separate from such, and to exclude them from their spiritual fellowship and communion:" *Barclay's Anarchy of the Ranters*, 53, &c. On the present occasion it is not my purpose, because for the determination of the controversy before us I do not find or deem it necessary, to inquire whether the society of Friends can, or may, or will, according to their rules, disown a member who holds unsound or heretical doctrines, who should disavow all the essential principles of christianity, and profess to believe that Jupiter and Mars and Apollo, and the fabled deities of Olympus, are the true gods, or that the "blood of bulls and of goats should take away sins;" but simply to show that the society, as such, have their faith, their principles, their doctrines, their peculiar faith, their distinctive principles, their characteristic doctrines, without which a man may be a heathen, a mohammedan, or even a christian, but cannot be one of the people called Quakers. Can I mistake in this, when I read such a passage as I have quoted from Barclay, a standard of the society, acknowledged, received, revered as such? What is his word just named, what is his "Apology," but an exposure of doctrine, of principle, of faith, of the doctrine, principle and faith of the Friends, avowed by them, published by them, resorted to by them as their light and guide in the hours of darkness, and doubt, and difficulty; in those trying hours, which come to them as they come to all men of religious feeling, when the light within needs oil, and the flickering flame of hope to be made steady and brilliant. Can I mistake, when the book of discipline, with uncommon solicitude, requires each preparative meeting of ministers and elders, no less than

three times in every year, to certify to its quarterly meeting, in answer to one of the queries, "whether ministers are sound in word and doctrine?" Soundness is a relative term, meaning freedom from error and fallacy, and necessarily requiring some standard whereby the word and the doctrine may be judged. The doctrine to be sound, must be conformable to some standard; and does not the query, then, assert that a standard exists in this church; and that thereby the doctrine of the minister may, by his fellow man, be compared and tried? If, however, I may mistake in thus reverting to these venerated sources, let us for a moment recur to the evidence. Abraham Lower, (1 vol. *Evid.* 369,) says, in connection with this subject, "The society, believing now as they did in the first foundation of it, that the bond of union by which it was bound together, was and is, 'the life of righteousness.'" Is not here a direct assertion, that there is a belief, and a belief not merely of individuals, but of the society as such? And he refers for an exposition, published and expressed, to the author and the book from which I have just quoted. In this connection, I recur farther, to the first document emanating from Green street, dated fourth month, 1827. "Doctrines held by one part of the society, and which we believe to be sound and edifying, are pronounced by the other party to be unsound and spurious." Now, I may be allowed to ask, why speak of doctrines, if the society, as such, has no concern with them? How are doctrines ascertained to be unsound and spurious, or sound and edifying, if there be no standard of faith and doctrine, no creed? Why should this difference or departure from a sound belief, be made a subject of complaint? How is such a denunciation to be reconciled with the alarm at a creed, or the dreaded attempt to control conscience and abridge the right of private judgment?

The meeting for sufferings, by the rejection of certain persons appointed by the southern quarter as representatives, are charged to have given "reason to apprehend that they were determined to control the operations of society according to their wills," and to have furnished "evidence of their having dissolved the compact, and so far as their own influence extended, and their

own acts could extend, separated itself from the society:" *Abraham Lower*, 1 vol. *Evid.* 370.

The meeting for sufferings, is a subordinate department for the business of this society, and especially to excercise care during the intervals between the sessions of the yearly meeting. If this body did improperly reject the representatives; if in this respect they violated the discipline, it is very obvious that their act, their unconstitutional act, could impart no censure whatever to the yearly meeting, much less destroy its existence. But the design, the motive, the ambitious and domineering spirit, which induced this conduct, these are, we are told, the consuming fires. The state of the case is shortly thus:—The meeting for sufferings is composed of twelve Friends appointed by the yearly meeting, and also of four Friends chosen out of each of the quarterly meetings; and the book of discipline provides that "in case of the decease of any Friend or Friends, nominated either by the yearly meeting or quarterly meetings, or of their declining or neglecting their attendance for the space of twelve months, the meeting for sufferings, if it be thought expedient, may choose others in his or their stead to serve till the time of the next yearly meeting, or till the places of those who have represented the quarterly meetings shall be supplied by new appointments:" *Book of Discipline*, 55. In the year 1826, the southern quarterly meeting resolved to release two of the persons who were then sitting as members of the meeting for sufferings under their appointment, and appointed others. The meeting were of opinion that such a measure was not contemplated by the discipline; that the quarter had a right to fill, but not to create vacancies; and that the only case which constituted a vacancy and called for a new appointment, was death, resignation, or neglect of attendance; neither of which then existed. The meeting for sufferings appointed a committee to confer with the quarterly meeting. The latter adhered to their resolution. The case was forwarded to the yearly meeting of 1827 for their care, and was one of those which, as already mentioned, were postponed: *Exhib. No.* 47, 2 vol. *Evid.* 477. Here, then, appears to have been a difference of opinion, on the construction of a clause in the book of discipline, respecting the power of the quarterly meet-

ing. Without undertaking to decide which is correct, there was certainly room enough for a diversity; and I can see no reason, either in the relation of the witnesses, or in an examination of the controverted clause, to doubt that the opinion entertained by the meeting for sufferings, was honest and sincere, and not feigned or fraudulent; more especially if, as alleged, it was sanctioned by a practice of seventy years, coeval with the existence of that meeting. Now an honest diversity of opinion as to constitutional powers, could not "dissolve the compact;" nor could the act of the meeting, in sending a committee to confer with the quarter, nor even their omission to yield to the determination of the quarter, until the matter could be investigated and decided by the ultimate and competent tribunal, the yearly meeting. But in whatever light we may view this matter, it is, as already observed, the act of the meeting for sufferings, not of the yearly meeting. The course pursued by the latter, and the reason of that course, have been already mentioned and considered. If, indeed, "this circumstance" had produced, as is said by one of the witnesses, (*Halliday Jackson*, 2 vol. *Evid.* 48,) "as great a sensation throughout the society, as, perhaps, any other circumstance that occurred previously to the yearly meeting of 1827," there needs be no surprise that this meeting should not be in a state to take it under consideration; and the propriety of a postponement until time should have shed its calming influence, and the consistency of this course with the avowed principles and frequent practice of the society of Friends, are very manifest.

The remarks which I have made on these cases, selected by way of example, and for the sake of illustration, render it unnecessary that I should particularly notice, or enter at large into the statement or consideration of others of the same general character. If the principles which I have endeavored to establish, and have applied to these cases, are correct, the others can have no greater influence on the question of the continued existence of the yearly meeting.

Another point has been decidedly taken, on the part of those who maintain the dissolution and reorganization of the ancient yearly meeting, and which I have shortly, under this head, expressed by the phrase, "feelings of individuals." It is more at

large explained, in the first public document issued from the meeting in Green street, thus: "The unity of this body is interrupted; a division exists among us, developing views which appear incompatible with each other, and feelings averse to a reconciliation." Now admitting this to be true, and it may, perhaps, be rather to be lamented than denied, that such incompatible views and averse feelings existed in both parts of this body; what consequence can fairly, legally, upon any practical principles of human action, result to the existence of the meeting, and the connection of the society? What consequence, on the pacific principles always maintained among the Friends? If time, charity, a recollection of the common sufferings of themselves and their ancestors; if prayer and supplication; if the smiles of the Great Head of the church universal, would not change and reconcile these views, reverse and soothe these feelings, then might those who thought "the period had fully come when they ought to look towards making a quiet retreat," have justly said to the others, "Let there be no strife, I pray thee, between me and thee, and between my herdsmen and thy herdsmen, for we be brethren! Separate thyself, I pray thee, from me; if thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." But without even an attempt at such voluntary separation, I can see no safe principle, which will entitle a portion of those who entertained such views and feelings, on account of their existence and prevalence, to disfranchise the rest, to declare the ancient meeting dissolved, the society broken up into its individual elements, and then proceed to erect among themselves a new body, and declare it the society of Friends, and its meeting, not merely a new yearly meeting, but the ancient and legitimate yearly meeting; not a new yearly meeting, but the meeting resettled on its ancient foundations and principles.

If a portion of this religious community found, or believed to exist, in another portion, such feelings and views as rendered it impracticable for them any longer to fraternize, any longer peacefully, harmoniously and profitably to meet and commune and worship together, a very sufficient reason, in conscience, may have been thereby afforded them to withdraw, to make "a

quiet retreat;" and the principles of the government under which we have the happiness to live, would have sustained them in the measure, and allowed them to join any other religious community, or form another association, of whatever name, for religious purposes. But the existence of such feelings and views, would not deprive those who remained of their ancient name, rights and privileges, if they retained their ancient faith and doctrine, maintained their wonted testimonies, and adhered to their ancient standards; nor would the act of withdrawal, even if by a majority, confer on them the form and name, the power and authority of the ancient community. In like manner, if a portion discovered in the rest, or in some of the more influential members, a determination "to rule or to rend," although hereby, in conscience, a sufficient reason to excuse or justify a withdrawal might be found, yet could not even a majority carry with them, the power and authority and rights of the whole, unless the disposition or determination had been carried out into overt acts; for, of the latter only, can men judge or be judged by their fellow men, while of the former, He alone can take cognizance, who knoweth the secrets of all hearts.

I have thus endeavored to examine and weigh, in detail, or by its principles, every argument which I have either heard or read, to prove that the body which sat in Arch street meeting-house, in April, 1827, was not, or ceased to be, the Philadelphia yearly meeting of Friends. The position is not maintained. At the closing minute, that body was the ancient legitimate yearly meeting, as fully as during the forenoon sitting of the first day, or as it had been at any point of time since the year 1685.

If this be true, if the body which then closed its functions for the time, in the usual manner, and by the ancient minute, was the legitimate body, it is enough for the present occasion, nor need we look at its future history, because the new body, which claims its power and place, assembled in the course of a few months, and before the recurrence of the next annual period. It may not, however, be unprofitable to state in this connection, as appears from the evidence, that in the year 1828, and since, annually, at the wonted time and place, meetings have been held, of such as have thought proper to attend, of the acknow-

ledged members of the ancient society, who have not been disfranchised by any act of any tribunal, claiming to represent the society of Friends, or to possess or exert any power of disownment.

If the body which thus held and closed its session, was the regular, constitutional yearly meeting, it follows, as an inevitable consequence, that the assembly which convened in October, of the same year, in Green street, could not be, whatever name it may have assumed, the ancient legitimate yearly meeting, the common head and centre of the subordinate meetings, and of the society of Friends in New-Jersey and Pennsylvania. One meeting being in life, another of the same powers, rights, and jurisdiction, could not, according to the discipline of the society, according to the simplest elements of reason, according to the immutable rules of action, which must govern and control all human assemblages, of whatever nature, whether religious or civil; according, indeed, to the avowed doctrines of the pleadings in this cause, and the consentaneous declarations of counsel, a second, a subsequent meeting could not be set up within its bounds. The yearly meeting, having convened and closed in April, 1827, could not again convene, nor could any body, possessing its powers and authorities convene, until the same month of the succeeding year, 1828. The place of meeting was fixed by the voice of the yearly meeting, which alone had the authority in this respect, and alone could change it. The time was directed by the constitution or book of discipline, to which we have had so frequent occasion to refer. The time could, indeed, be altered by the yearly meeting, but by it alone. There was no adjournment made by the yearly meeting to a shorter day than the annual period. There is no provision in the constitution for an intermediate, or as it is commonly denominated, a special meeting; nor is authority given to the clerk, to any portion of the members, or invested any where else, to call such meeting. Hence it clearly follows, that according to the constitution, the yearly meeting could not again assemble, until 1828; and no body, of whomsoever consisting, or by whomsoever composed, which may have convened in the intermediate

period, could, conformably to constitutional principles, be the Philadelphia yearly meeting.

We learn, however, from the evidence before us, that on the nineteenth, twentieth, and twenty-first days of April, during the yearly meeting, and after its close, a number of Friends met together to confer on the state of the society. They resolved to meet again, and accordingly did meet, in the sixth month of that year, and then recommended that a yearly meeting should be held, on the fifteenth day of the ensuing month of October. A meeting was held at the Green street meeting-house. And this meeting is said by Stacy Decow, in his answer to the bill of interpleader, to be "the true and legitimate yearly meeting of Philadelphia," and by one of the witnesses, is called "the yearly meeting reorganized:" *Abraham Lower*, 1 vol. *Evid.* 404. We are now to examine whether it was so; and in the present inquiry I propose to lay out of view the fact, which I believe has been fully demonstrated, that the yearly meeting was actually in full vigor and capacity.

This inquiry is to be conducted under two different aspects; first, on the assumption that the constitution, or discipline of the society remained in force; and secondly, on the assumption that the hedge was thrown down, the bond of union unloosed, the society broken up into its individual elements, the constitution or discipline not providing for the emergency, or having crumbled into dust.

*First.* The constitution is in force. The time and place of the yearly meeting are fixed. April, not October, is the one; Arch street, not Green street, is the other. Neither can be changed without the resolution and authority of the yearly meeting. No such authority was given. On the contrary, the resolve of that body was, that the next yearly meeting should assemble on the third second day of April, at Arch street, at the usual time and place, "if the Lord permit;" and these latter words did not, as is asserted in the answer of Stacy Decow, constitute "a contingent adjournment," nor contemplate "the circumstance . . . of Friends not being again permitted to assemble at that time;" but were designed to acknowledge their humble and entire dependence on the Great Master of assemblies, without whose permis-

sion they neither expected nor wished again to convene. A special meeting of the yearly meeting is an anomaly, and unprovided for. Neither the few nor the many, have power given to them to convoke such meeting. If, then, the constitution was in force, the meeting in October was not the true and legitimate yearly meeting of Philadelphia.

*Second.* Let us now suppose the compact broken, the constitution dissolved, and the disjoined members at liberty to act from individual minds. Was the meeting entitled to the name it then assumed? There are three insurmountable obstacles. First, it was not convened as the ancient yearly meeting. Second, the members at large, the only constituent parts, or in other words, the individual elements, were not, and a portion of them only was, invited to assemble. Third, it was not composed or constituted as the ancient yearly meeting.

*First.* This October meeting was not called, nor did it come together as the ancient yearly meeting. The name which it thought proper then to assume, or which was then conferred upon it, cannot help this deficiency. In the call which was issued, the faintest idea is not held out that the ancient yearly meeting was to be convoked; no hint is given that the ancient meeting was to be reorganized, or to be settled on its ancient foundations and principles. On the contrary, the idea is conveyed with comprehensible distinctness, that a new yearly meeting was to be formed. The address, which bears date in June, contains, in the first place, an avowal of the design or object in view, "to regain harmony and tranquillity . . . by withdrawing ourselves, not from the society of Friends, nor from the exercise of its salutary discipline, but from religious communion with those who have introduced, and seem disposed to continue, such disorders among us." There is nothing here of remaining in the ancient yearly meeting, nor of continuing or reorganizing it. But let us proceed. "We therefore . . . have agreed to propose for your consideration, the propriety and expediency of holding," what? The ancient yearly meeting? No. "A yearly meeting for Friends in unity with us, residing within the bounds of those quarterly meetings heretofore represented in the yearly meeting held in Philadelphia." And farther, "It is recommended that

the quarterly and monthly meetings which may be prepared for such a measure, should appoint *representatives* to meet in Philadelphia on the third second day in tenth month next, at ten o'clock in the morning, in company with other members favorable to our views, there to hold a yearly meeting of men and women Friends, upon the principles of the early professors of our name." In this clause are several prominent points. First, the meeting was to be composed of representatives from the monthly as well as the quarterly meetings. Now, the ancient yearly meeting had no representatives from monthly meetings; certainly, since the discipline, as adopted and published in 1806. A *continuance* of the yearly meeting could not, then, have been contemplated, nor a reorganization of it, nor a settling of it on its ancient principles. Second, it was to be, not the Philadelphia yearly meeting, but "a yearly meeting of men and women Friends:" And thirdly, it was to be formed on the principles of the early professors of our name, not on the platform of the yearly meeting, as erected by the book of discipline.

*Second.* This meeting in October, was not so convened as to entitle it to assume the name, and to take the place of the Philadelphia yearly meeting.

If the yearly meeting was dissolved, and the society brought back to a mere collection of individuals; if the state of things were such that individual minds might now form anew or reorganize, as they are said to have originally formed, it is a very clear proposition, and not to be controverted, that all the individuals of the society ought to have been called; none should have been directly or indirectly excluded. Whatever dissensions had risen up, whatever animosities existed, the former members of the society remained such, and those who did not meet in Green street, in person or by representatives, were, as much as they who did, members and individual elements. All, then, had a right to be called, all must be called, all must be afforded an opportunity to assemble, or no convocation can be lawful, the true and legitimate yearly meeting cannot be there. Now, the recommendation or invitation to assemble, was not comprehensive, but exclusive, not general, but limited. A particular class or description only were invited; all the rest were debarred and

shut out. The maxim, *expressio unius est exclusio alterius*, is adopted in the law, only because it is the dictate of common sense. For whom was the meeting? Who were to attend? "For Friends in unity with us." Not for Friends in general, not for the members of the ancient yearly meeting, but for such only as were in unity with those who made the proposal. Who were invited to send representatives? All the monthly and quarterly meetings? By no means. "The monthly and quarterly meetings *which may be prepared for such a measure.*" This language cannot be misunderstood or misconstrued; and besides the representatives, for as we have heretofore seen, all who were led by inclination or duty, came in their individual capacity to the yearly meeting, who were to meet in company with them? All the society? All other members? Not so. "Other members favorable to our views." Was, then, the yearly meeting convoked? Was even a general meeting of the society of Friends called? Ingenuity cannot pervert, blindness cannot mistake, such perspicuity. If I may be permitted to use a term, because it is so common as to be well understood, and not because I mean to make any offensive application of it, the call was for the meeting of a party. I do not intend to say, a right party, or a wrong party, for the subject will, in its nature, admit of either qualification, but a party. And such a convocation, of a portion only of the society, the rest, whether majority or minority, or however small in comparative numbers, being excluded, cannot be the true and legitimate yearly meeting, cannot be the ancient yearly meeting reorganized and settled again on its ancient foundations and principles.

*Third.* The meeting in October was not composed or constructed as the yearly meeting.

I have, incidentally, adverted to this subject, in showing the nature of the call, or who were invited to attend the meeting; but I now present it as a characteristic difference between this assemblage and the yearly meeting. The yearly meeting is composed of members of two classes, individuals, and the quarterly meetings; the latter being represented by delegates. Such is not only the case since the present book of discipline was published by the society, but was the principle of organization when

this meeting was first established. Gough, the historian, says, "In the year 1669, it was found expedient and agreed upon, to hold a general meeting in London, representative of the whole body in England, and all other parts where any of the society were settled, which, having been henceforth held annually, is denominated the yearly meeting in London. This meeting is constituted of representatives deputed from each quarterly meeting in England, from the half-yearly meeting in Ireland, and sometimes from other parts, yet without restraining any member in unity with the society from attending:" 2 *Gough's History*, 163. But the meeting in Green street was composed of three classes, individuals, quarterly meetings, and monthly meetings; some of the latter, as bodies, Mount Holly, Chesterfield and Radnor, being represented by their delegates: *Exhib.* 9. It is no answer, that members of this society are entitled to sit in their individual capacity, and therefore, whether there as individuals or delegates, can make no difference. This result does not follow. The representatives alone, it will be remembered, perform the important service of nominating a clerk to the meeting. And hence, the clerk who acted for, and was appointed by this meeting was nominated, at the least in part, by the representatives of monthly meetings, who were irregularly there. And the incongruity of this procedure farther appears from this, that the individual members first appointed, in their monthly meetings, the representatives of those meetings, and then themselves attended as individual members. It is manifest, therefore, the October meeting was not composed as a yearly meeting should, and could only, have been.

In the course of this investigation, it has repeatedly occurred to me, and every time with increasing force, that the grounds of division, if no difference of religious faith existed, were of an inferior and evanescent nature. It seems to me, though perhaps I am unable, not being a member of the society, properly to appreciate the matter, that patience, forbearance, brotherly kindness and charity, the meek and mild spirit which has been believed to characterize and adorn the genuine Friend, would, under the smiles and blessing of Providence, have wrought out a perfect reconciliation, have brought again these discordant minds to the

wonted harmony, and the unity of spirit would have again prevailed. If, indeed, a difference of faith and doctrine had grown up and become strong; if either portion had fallen off from the ancient principles of their church, and I use the term, here, as did Fox and Barclay and Penn, the breach is not the subject of surprise, and it must, with no less truth than regret, be said, "between us and you there is a great gulf fixed." In the pleadings of this cause, in the extended volumes of testimony, and in the laborious arguments of the counsel, I do not remember any charge that the members of the society, who remain connected with the Arch street meeting, have departed from the doctrines and principles of Friends, as stated by their founder and his early followers; and I rejoice that I have not been constrained to inquire into the charge of departure, so freely and frequently urged against the members of the Green street meeting. In any remarks I have made, I am not to be understood as asserting or countenancing such a charge. Nor do I mean to say, they either had or had not grounds and reasons sufficient to induce a separation. With these, I do not profess, for this court, in the present cause, to interfere. It is with the legal consequences of their acts, we are to concern ourselves. A separation of a portion does not necessarily destroy or impair, nor, as it respects legal existence, even weaken the original institution. This doctrine was distinctly asserted by the supreme court of this state, in the case of Den against Bolton and others, which arose on the division in the Reformed Dutch church of the United States.

Upon the whole, I am brought, by the most careful, faithful, and minute investigation of which I am capable, to the result, that the Arch street meeting was, and the Green street meeting was not, the Philadelphia yearly meeting of the society of Friends.

We are now to look for the consequences on the cause before the court. We have seen that every preparative meeting within the states of Pennsylvania and New-Jersey, which is, through and by its connecting links, connected with, and subordinate to, the yearly meeting of Philadelphia, is a preparative meeting of the people called Quakers; and any preparative meeting or assemblage of persons calling themselves a preparative meeting,

not thus connected and subordinate, is not a preparative meeting of that people, within the meaning of their constitution and discipline, and within the meaning of the subscription to the school in the present case, or in other words, the instrument whereby the trust fund was created. We have farther seen, that the preparative meeting having authority to appoint the treasurer of the school fund, is the preparative meeting of Chesterfield, connected with, and subordinate to, the yearly meeting of Friends of Philadelphia. We have seen the that preparative meeting whereby Stacy Decow was appointed treasurer, was not, at the time of that appointment, connected with, and subordinate to, the Arch street meeting, but had previously disunited itself therefrom, and connected itself with the Green street meeting; and that, therefore, it was not the Chesterfield preparative meeting of Friends, at Crosswicks, meant and mentioned in the establishment of the school fund, and had not competent authority to discharge Joseph Hendrickson and appoint a successor.

There is, then, no successor to the person named as treasurer in the bond and mortgage, and he has, consequently, the legal right to recover the money.

I do, therefore, respectfully recommend to his excellency the chancellor, to decree upon this bill of interpleader, that the principal and interest mentioned in the said bond, and intended to be secured by the said mortgage, of right belong, and are payable to the said Joseph Hendrickson, and that he be permitted to proceed on his original bill of complaint, or otherwise, agreeably to the rules and practice of the court of chancery.

CHARLES EWING.

DRAKE, Justice. The present controversy has grown out of the prosecution of a certain bond and mortgage, bearing date the second day of fourth month, (April,) A. D. 1821, executed by Thomas L. Shotwell to Joseph Hendrickson, treasurer of the school fund of Crosswicks meeting, to secure the payment of two thousand dollars, with interest, at six per cent., to the said Joseph Hendrickson, treasurer as aforesaid, or his successor, or to his certain attorney, executor, administrator, or assigns. Upon this bond, the interest had been duly paid until the second day of

April, A. D. 1827. The interest from that date, together with the principal, composes the sum now in dispute.

It is admitted that the money for which these securities were given, is part of a fund, the principal part of which was raised about the year 1792, by the voluntary subscriptions of a considerable number of the members of the preparative meeting of the people called Quakers, at Crosswicks, in the township of Chesterfield, county of Burlington, and state of New-Jersey; for the purpose of creating an interest, or annuity, "to be applied to the education of such children as now do, or hereafter shall, belong to the same preparative meeting, whose parents are not, or shall not be, of ability to pay for their education." And this fund was to be "under the direction of the trustees of the said school," (the school then established at Crosswicks,) "now, or hereafter, to be chosen by the said preparative meeting."

It is further admitted, that previous to the year 1827, there was but one preparative meeting of the people called Quakers, at Crosswicks; although it was sometimes designated as the Chesterfield preparative meeting, at Crosswicks; and at other times, as the preparative meeting of Friends, at Crosswicks. It was an association, or meeting, of the religious society of Friends; and it had the power to appoint the trustees of the school, the treasurer, and other officers of the association.

Joseph Hendrickson, one of the above named parties, was appointed treasurer of this meeting in 1816, and was continued in that office, as all parties agree, until the summer or autumn of 1827, when disputes arose in that meeting, and others with which it stood connected, which resulted in the separation of one part of its members from the other part. One party, or division of that body, have continued the said Joseph Hendrickson in the office of treasurer. The other party, in the month of January, 1828, appointed Stacy Decow, another of the above named parties, to the same office, and have continued him in that office until the present time.

Both Hendrickson and Decow, claim to be the treasurer of the Chesterfield preparative meeting, and, in that capacity, to have the custody of this fund. As both *have been appointed*, although by different bodies, or different parts of the same body,

the title to the office must depend upon the appointing power; that is, the preparative meeting. And inasmuch as two several bodies pretend, each, to be the true preparative meeting, and one only is contemplated as the trustee of this fund, it becomes necessary to inquire which is the true preparative meeting.

It appears by the testimony, that on the twenty-seventh day of December, A. D. 1827, the Chesterfield preparative meeting of Friends was divided, by the minority of the members, assembled at that time, withdrawing to another house, leaving the majority, with the clerk, at the usual place of meeting. They continued their business there; and the minority organized anew, or held another meeting, having appointed a new clerk to act for them.

If this preparative meeting were an *independent body*, acting without the influence of any conventional principle operating upon this point, the act of the minority on this occasion would not affect the powers of the majority who remained in session; however it might expose itself, and the members composing it, to disabilities. But the right to make appointments, and to exercise the other functions of the preparative meeting, would still continue with the larger party: 7 *Serg. and Rawle*, 460; 5 *Binney*, 485; 5 *Johnson*, 39; 1 *Bos. and Pul.* 229; 2 *Dessauseure*, 583; 16 *Mass.* 418.

But the preparative meeting is not an independent body, but a component part of *the religious society of Friends*. Hence, it is necessary to examine its connection with the society of *Friends*, and the history of that society, so far as it influences the separation in this preparative meeting, in order to determine the question, which of these bodies is the true preparative meeting; and is, of course, entitled to appoint a treasurer, and to manage this fund.

The society of Friends, as it existed at the time when this school fund was created, and thence down to the year 1827, was an association of christians, bound together by a distinct government, peculiar testimonies, and, as one party contends, by certain religious doctrines, deemed by them fundamental. For their government, the Friends residing in New-Jersey and Pennsylvania, as early as the year 1689, established a general meeting, called a

yearly meeting, in which the numerous inferior meetings have been represented, and which all the members of the society have had a right to attend: 1 vol. *Evid.* 333. That yearly meeting, soon after its institution, adopted and published certain articles of government, called, "Rules of discipline of the yearly meeting of Friends, held in Philadelphia." This is acknowledged by all the parties to this suit, as their system of government, and by that, so far as its provisions extend, all profess to be willing to be tried. In this publication, we find that their meetings for discipline are declared to be; (*Intro. Discip.* 3,) "First, preparative meetings, which commonly consist of members of a meeting for worship; second, monthly meetings, each of which commonly consists of several preparative meetings; third, quarterly meetings, each of which consists of several of the monthly meetings; and, fourth, the yearly meeting, which comprises the whole."

And the connection and subordination of these meetings, are declared to be thus; (*Discip.* 31,) "Preparative meetings are accountable to the monthly; monthly, to the quarterly; and the quarterly, to the yearly meeting. So that, if the yearly meeting be at any time dissatisfied with the proceedings of any inferior meeting; or the quarterly meeting with the proceedings of either of its monthly meetings; or a monthly meeting with the proceedings of either of its preparative meetings; such meeting or meetings ought, with readiness and meekness, to render an account thereof, when required."

This preparative meeting at Chesterfield, was established at an early period. It was, ever since its origin, connected with, and, in the sense of the book of discipline, subordinate to, the Chesterfield monthly meeting; which was subordinate to the Burlington quarterly meeting; and that, to the Philadelphia yearly meeting.

Such were the connections sustained by this preparative meeting, at the commencement of the year 1827. I said, that we must review the history of the whole body, so far as it operated upon the division of the Chesterfield meeting, at the close of that year. During the same year, a division took place in the Philadelphia yearly meeting, which was followed up by divisions in all the subordinate meetings, or at least all with which this pre-

parative meeting was connected in its subordination. The division so resulted, that as early as tenth month, 1827, there were two yearly meetings in existence, (1 vol. *Evid.* 622; vol. *Evid.* 457,) each claiming to be the true yearly meeting of the society of Friends; one assembling in Arch street, and the other in Green street, Philadelphia. Which of these two meetings was the head to which the inferior meetings should account, &c. according to the constitution of the society? They could not both be. For in this case, it would not only be hard, but impossible, for the inferior meetings to serve two masters. But which should it be? Upon this point the members of the inferior meetings could not agree. And hence, a corresponding division took place in the Burlington quarterly meeting, in eleventh month, 1827, (2 vol. *Evid.* 207–8,) which resulted in two distinct quarterly meetings; one assembling at the city of Burlington, and the other at Chesterfield. And a division also took place, in ninth or tenth month, 1827, in Chesterfield monthly meeting. A dispute arising, respecting the propriety of granting a certificate of membership to an individual, to be presented to Green street monthly meeting; which dispute was founded on the question, whether that meeting still retained its connection with the Arch street yearly meeting, or had joined that of Green street: the clerk, David Clark, not acting in reference to this matter with the promptness desired by the party in favor of making the certificate, they considered him as refusing, or at least, as neglecting to serve the meeting, and at once called another person, Jediah Middleton, to the chair, to serve them as clerk: 1 vol. *Evid.* 337; 2 vol. *Ibid.* 284. After which, the two parties conducted their business separately; the minority and old clerk, adhering to the Burlington quarterly meeting, in connection with the Arch street yearly meeting, and the other party sending representatives to the Green street yearly meeting: 2 vol. *Evid.* 296–7, 323.

It was after this complete division of the Chesterfield monthly meeting, that the transaction took place in the preparative meeting before noticed. These meetings were composed, in some measure, of the same persons. The clerk, James Brown, and many other persons there, had previously manifested their partiality to one or the other of the great parties which had grown,

up in the society, and to their respective yearly meetings. In making out answers to the queries, which were, by the monthly meeting, in eleventh month, 1827, addressed to the preparative meeting according to the book of discipline, page 89, the clerk of the preparative meeting had made return to Jediah Middleton, the clerk of that monthly meeting connected with the Chesterfield quarter, and Green street yearly meeting; (2 vol. *Evid.* 323,)—thus acknowledging the meeting of which he was clerk, to be a branch of that yearly meeting. He had also denied the authority of the monthly meeting, of which David Clark was clerk: 1 vol. *Evid.* 325; 2 vol. *Ibid.* 323. In eleventh month, 1827, the Burlington quarter, connected with the Arch street yearly meeting, appointed a committee to visit its subordinate meetings: 1 vol. *Evid.* 325–6. On the twenty-seventh of twelfth month, (December,) that committee presented themselves before the Chesterfield preparative meeting then assembled. A committee also presented itself from the Burlington quarter, connected with the Green street yearly meeting. An inquiry was made of the clerk, or meeting, in what connection this preparative meeting was then acting. No direct reply was given. It being manifest that the harmony of the meeting was broken, and all parties knowing the predilections of themselves and others to be so fixed, that it was useless to spend time in debate, the minority, wishing to sanction no proceeding which would change their connection or allegiance, withdrew; protesting against any forfeiture of their rights thereby. Since which, the two parties once composing that preparative meeting, have each held its own meeting, in subordination to their respective monthly, quarterly, and yearly meetings, as before stated.

Much investigation was made into the precise conduct of the respective parties, in effecting these divisions; but I do not regard the particular acts, or formalities, observed by these subordinate meetings, as of much consequence, seeing there is a complete separation of the society into two distinct bodies, acting under separate governments; although each still professes to adhere to the ancient discipline and worship. Our inquiry now must be, whether each of these bodies is to be considered as the society of Friends, contemplated in this trust, or only one of

them: And if but one, which is that one? And which yearly meeting represents it? For if there be but one society, and one yearly meeting which answers to the trust, the inferior meetings must follow the fate of those to which they stand connected. Every Friend is a member of this yearly meeting. It is the yearly meeting which overlooks, controls, and exerts a care over all that are in connection with it; which hears their appeals in the last resort; which preserves their uniformity in discipline, and in the maintenance of their peculiar testimonies; in a word, which identifies them as a body of *Friends*. And in order to determine which is the true preparative meeting at Crosswicks, we must ascertain which is the true yearly meeting of *Friends*, held in Philadelphia.

The yearly meeting was established in Burlington, in the year 1681: 1 vol. *Proud's Hist. Penn.* 160–61. It was held alternately at Burlington and Philadelphia, from 1684 to 1761; after which it was removed entirely to Philadelphia, and was held there annually and in great harmony, until within the last ten or twelve years; within which time, jealousies have arisen among the members, which increased, until the meeting held in fourth month, 1827, which was the last held by the united body. The dissensions previous to, and at that meeting, came to such a height, that one party withdrew, and took measures for the formation of a new yearly meeting, as the other party insist, or as they say, for the reorganization and purification of the old one. It will be necessary to look a little into particulars, to discover the character of this transaction, and what should be its effect upon the present case. And I should have observed, that I use the word party, or parties, "Orthodox" and "Hicksite," in this opinion, merely to designate individuals or bodies of men, acting together, and not with any reference to the feelings, motives, or principles, upon which they may have acted.

Questions of importance were expected to arise at the yearly meeting of 1827, upon which disagreement was anticipated. The respective parties made such preparations for the approaching business of that meeting as they deemed proper. The clerk, being the officer who collects the sense of the meeting on the questions submitted to it, and declares its decisions, was justly

considered as holding an important station, which neither was willing to have filled by a person unfriendly to its views. The nomination of a clerk to the yearly meeting, was the appropriate business of the representatives from the quarterly meetings: 1 vol. *Evid.* 68, 217. In the meeting held by them for that purpose, Samuel Bettle and John Comly were nominated. Each party advocated the pretensions of its favorite candidate, but neither candidate was agreed upon. Upon its being reported to the yearly meeting, that the representatives were unable to agree, some person suggested, that it was the practice of the society for the old clerk to act until a new one was appointed; 1 vol. *Evid.* 68, 218. In this, there was at least a partial acquiescence of the opponents of the old clerk: 1 vol. *Evid.* 69, 218; 2 vol. *Ibid.* 21, 267, 392. He took his seat at the table, and John Comly, the rival candidate, took his, as assistant clerk. The next morning the latter expressed a repugnance to serve the meeting, made up, as he stated, "of two irreconcilable parties;" but for some reason or other, he again acquiesced, and acted as assistant clerk the residue of the meeting. One other subject of dispute occurred towards the close of that meeting. It was respecting the appointment of a committee to visit the inferior meetings. To this there was considerable opposition, but the clerk finally recorded a minute in favor of the appointment. After which, the meeting adjourned, "to meet at the same time and place the next year:" 1 vol. *Evid.* 70.

On the nineteenth, twentieth and twenty-first of April, 1827, and during the sitting of the yearly meeting, another meeting was held in Green street, at which an address to the society of Friends was agreed upon; which was subscribed, by direction and in behalf of said meeting, by John Comly and others; in which address, after alluding to the divided state of the society in *doctrine* and in feeling, and to measures of the yearly meeting deemed oppressive, they state their conviction, "that the period has fully come, in which we ought to look towards making a quiet retreat from this scene of confusion:" 2 vol. *Evid.* 454. They adjourned, to meet again in the same place on the fourth day of sixth month, (June,) 1827. At which second meeting, they agreed on and published a second address, in which, after

adverting to disorders and divisions in the society, and transactions of the late yearly meeting, against the sense, as they considered, of the larger part of that body, they add, "Friends have viewed this state of things among us with deep concern and exercise, patiently waiting in the hope, that time and reflection would convince our brethren of the impropriety of such a course, and that being favored to see the evil consequences of such conduct, they might retrace their steps. But hitherto, we have waited in vain. Time and opportunity for reflection have been amply afforded, but have not produced the desirable results. On the contrary, the spirit of discord and confusion have gained strength, and to us there appears now to be no way to regain the harmony and tranquillity of the body, but by withdrawing ourselves, not from the society of Friends, nor from the exercise of its salutary discipline, but from religious communion with those who have introduced, and seem disposed to continue, such disorders among us." The address concludes, by proposing for consideration, "the propriety and expediency of holding *a yearly meeting of Friends in unity with us*, residing within the limits of those quarterly meetings, heretofore represented in the yearly meeting held in Philadelphia, on the third second day in tenth month (then) next: 2 vol. *Evid.* 455, 456. At which time, a yearly meeting was accordingly held, in Green street, Philadelphia; which has been continued, at the same place, from year to year; and which is the same yearly meeting, to which the Chesterfield monthly meeting, of which Jediah Middleton is clerk, sent representatives, and to which that meeting, as well as the preparative meeting of which James Brown is clerk, gave in their adhesion: 1 vol. *Evid.* 50.

Which of these yearly meetings represents the society of Friends contemplated in this trust? A first view strongly inclines us to answer, it is that held in Arch street. That was regularly adjourned to meet at the same time and place next year, and was then held accordingly, and has been regularly continued until the present time. The other meeting was held, first, in tenth month, 1827, by those who *retreated*, or withdrew from the disorders of the other, at a new time, in form at least, and a new place. One is the *old* meeting, and the other the *new*. But some circum-

stances attending this separation, involve the case in some degree of doubt. Those who formed the Green street meeting, claim to be the *majority*. They complain of various abuses existing in the society for the preceding five years; that "measures of a party character were introduced" into some of their meetings for discipline; and that "the established order of society was infringed, by carrying those measures into execution *against the judgment, and contrary to the voice, of a larger part of the Friends present.*" "At length, the infection taking a wider range, appeared in our yearly meeting, where its deplorable effects were equally conspicuous. Means were recently taken therein to *overrule the greater part of the representatives, and a clerk was imposed upon the meeting without their concurrence or consent.*" And "a committee was there appointed to visit the quarterly and monthly meetings without the unity of the meeting, and *contrary to the solid sense and judgment of much the larger number of members in attendance:*" 2 vol. *Evid.* 456.

In connection with these complaints, we must take into consideration some peculiarities in the mode of conducting the religious meetings of Friends. It is insisted by the Arch street party, that the members of a meeting for discipline, are not entitled to equal weight in their decisions; so that the clerk, whose business it is to ascertain and record the sense of the meeting, should not count the number of persons present, and decide with the majority of voices, but should pay more attention to elderly, pious, and experienced men, than to those of an opposite character: 1 vol. *Evid.* 64, 184, 333. On the other side, it is insisted, that all have an equal voice, and that it is the duty of the clerk to record the opinion of the majority, in numbers; or at least, that he should not record a minute against the sense of the majority: 1 vol. *Evid.* 43; 2 vol. *Ibid.* 244. Another peculiarity is this, insisted on by the Arch street party, and apparently conformable to usage, that until the appointment of a new clerk, the old one is to act. It may be easily perceived, that the effect of these principles combined, may be to place the meeting under the control of a minority, however small, or even of the clerk himself; and that the majority have no *ordinary* means of re-

dress, for they never can appoint a new clerk, and never can carry any measure, however just and important, if unreasonably opposed. And, *if it be true*, that through the operation of these principles, the majority, in the yearly meeting of fourth month, 1827, was deprived of its rights, it would incline me very much, to endeavor to distinguish this case from that of an ordinary secession from the government of a religious society.

The complaint, that the majority was overruled, relates, I presume, more particularly to the meeting of representatives from the various quarters, whose business it was to nominate a clerk. But the proceedings there may have had, and were evidently, by all parties, expected to have, an important bearing on the proceedings of the yearly meeting. The facts are somewhat variously stated by the different witnesses. But, in the view I shall take of this question, I do not think it necessary to make a minute inquiry into the facts, or to decide those which are controverted.

It appears distinctly that no count, or other certain means of ascertaining the majority, was resorted to. The Green street party, however, claim the benefit of a presumption that they were the majority, arising from the fact that they insisted that the majority ought to govern, and endeavored to take measures to ascertain it: 1 vol. *Evid.* 372–3. This was resisted by the other party, either from conscious inferiority of numbers, or from a consciencious desire not to violate the ancient usage of the society, as to the mode of ascertaining the solid sense of a meeting.

As to the true mode of ascertaining the sense of a meeting, all agree that it is the duty of the clerk to collect it, and it has been the uniform practice in the society, for him to do so without resorting to a formal count, or division of parties: 1 vol. *Evid.* 64, 330, 458; 2 vol. *Ibid.* 169, 250. This society commenced in persecution, and has, heretofore, been distinguished for its harmony. Believing in the operation of the spirit of truth on their minds, not only in worship, but in business, if properly sought for, it has been their practice solemnly to seek the guidance of the light within, and seldom, or never, to attempt influence, through ingenious argument, or noisy declamation. Hence, few

have attempted to speak on questions. And these would naturally be the experienced and aged. A few voices from such quarters, unopposed, has always been sufficient to guide the clerk. If a contrariety of views appeared, it has not been the practice to continue the debate a long time, but if one party did not soon yield, to postpone the subject for further consideration. Hence, it has doubtless been usual for the clerks to look to leading men, principally, in gathering the sense of the meeting. And this practice being ancient and uniform, and withal countenánced by some of their most respected writers, and connected with their religious faith, strengthens one party in its opinion, not only that it is right for the clerk to do so, but that he may carry it so far, as to record a minute in opposition to the sense of the majority in numbers: 1 vol. *Evid.* 35, 64, 184, 333. The other party insist, on the contrary, that the government in a yearly meeting is strictly democratic; that all have equal rights and an equal voice, (1 vol. *Evid.* 43; 2 vol. *Ibid.* 244,) and that however much the young and inexperienced may, in times past, have yielded to the wise and aged, through courtesy, or from other causes, yet, upon a question of strict right, they are all equal. This usage, as it has existed, has no doubt been salutary in its influence, and it is highly expedient to preserve it. Indeed, it appears to be of almost vital importance to a religious society like this; into which, members are admitted without any public declaration of their faith, and even as a birthright. And yet it is difficult to apply it, and act upon it, under such circumstances as resulted in the present division. Here were two great parties, dividing, not only the numbers, but the talents, experience, and piety of this society, separated on important questions, and each tenacious of its opinions. How shall *their* controversies be decided? It is a general principle relating to all associations of men, that all the members of a meeting, who have a right to a voice at all, have a right to an *equal* voice, unless there be something in the terms of the association to vary those rights. It is conceded that all the members of this society, have the right to attend the yearly meeting; and that the clerk *may* notice the opinions of all: 1 vol. *Evid.* 85, 333. How, then, is he to distinguish between them? The *usage* to accord superior weight

to superior piety and experience, has, indeed, been uniform, yet it seems to want that degree of *certainty*, in its application, which an *imperative rule of government* requires. Who is to judge which members have the most wisdom, or the greatest share of the spirit of truth? Each individual may concede it to another, so as to yield his own opinion to him, if he will. But who shall judge of it for a whole assembly? Who shall allot among a great many individuals, their comparative weight? If any body, it must be the clerk. The result is, that the government, if not a democracy, very much resembles a monarchy. Neither party would be willing to call it the latter, unless by supposing the Great Head of the Church to preside, and rule therein. And this is, no doubt, the theoretic principle on this point. But who is to declare his decisions? We come back again to the clerk. Will he always declare them truly? To err, is human. He may be directed by light from above, or he may follow his own will. And this contest shows that neither party had any confidence in the infallibility of the clerk, under the unusual and trying circumstances which existed. The persons nominated by the two parties, were respectable men, of great worth and experience. They had both, for a long time, served the society very satisfactorily, in the most responsible stations,—those of clerk, and assistant clerk. But both had, or were suspected to have, partialities, or wishes of their own, to be gratified by the decisions of the yearly meeting. And the consequence was, that they were both objects of the greatest distrust. The "Orthodox" did not believe that John Comly could serve the meeting faithfully, and the "Hicksites" were equally dubious of the infallibility of Samuel Bettle.

This feature in the government of this society, whatever may be its precise limits, is intimately connected with their religious principles and doctrines: 1 vol. *Evid.* 64. They believe that the Head of the Church, when properly invoked, will shed his influence upon their meetings, and be "a spirit of judgment, to those who sit in judgment." Hence, the clerk is suffered to gather *the feeling and sense* of a meeting, from those who have long manifested a spiritual walk and conversation, aided by the agency of the spirit of truth, in his own mind. But, it

is at least *possible*, that a meeting should be unfitted, in a measure, for this intercourse with the spirit; and that the clerk may be influenced by earthly passions, and have a will of his own to subserve, as well as that of the Great Head of the Church. Should such a case arise, it must be perceived that the beauty of this theory is marred, and the government becomes, *not what it was intended to be.* May it not be said, that in such case, the *condition* on which the power of the clerk and the minority is founded, is broken? But if it be, who is to declare whether such a case has, or has not, arisen? Or, what is to be the effect of an abuse of this power? Or, how is it to be relieved against? I find myself met by these questions, and others, connected with this important and delicate subject. And supposing that the decision of this cause does not require an investigation of them, I shall not attempt it. Hence, I wish not to be understood as intimating any opinion, as to the complaints of the Hicksite party; whether there were really any good grounds for them, or not; or, whether, if there were, it would justify the course they took, or save them from the legal consequences of a secession. I would only observe, further, on this branch of the subject, that were this a *mere naked trust*, to be performed *immediately*, by the yearly meeting, I think I should have no hesitation to award it to the Arch street meeting; that being, in point of form at least, the same meeting which was in existence at the time the trust was created. But the Chesterfield preparative meeting, with respect to this fund, may fairly be considered, not merely as a trustee, but as having a beneficiary interest, inasmuch as the fund is to be expended in the education of the children of such of its members as are poor. It is a subordinate meeting, the pretensions of which are to be settled, by its acknowledging one or the other of these yearly meetings as its head. There was some difficulty in selecting which it should acknowledge; and if the majority have mistaken the truth, and connected themselves with the wrong head, (supposing this to be a mere dispute as to government, or discipline,) I should feel very reluctant to conclude that they could have no further right or interest in the fund. But, as I before intimated, I mean not to form, or express an opinion on this subject; for, in surveying the pleadings and

testimony in this cause, the conviction urges itself strongly upon my mind, that there is another great distinction between these parties, which may be resorted to, to ascertain which is the true society of Friends, so far as the purposes of this case require the decision of that question. I mean the difference in *doctrine*.

Hendrickson, in his answer to the bill of interpleader, alleges that "the society of Friends, as a christian sect, hold doctrines in reference to christianity, which, like those of other sects, are in some measure, common to all christians, and in other respects, peculiar to themselves." And that "the following religious doctrines have always been held and maintained by them:" 1 vol. *Evid.* 30.

"In the first place, although the society of Friends have seldom made use of the word trinity, yet they believe in the existence of the Father, the Son or Word, and the Holy Spirit. That the Son was God, and became flesh,—that there is one God and Father, of whom are all things,—that there is one Lord Jesus Christ, by whom all things were made, who was glorified with the Father before the world began, who is God over all, blessed for ever,—that there is one Holy Spirit, the promise of the Father and the Son, the leader, and sanctifier, and comforter of his people, and that these three are one, the Father, the Word, and the Spirit. That the principal difference between the people called Quakers, and other protestant trinitarian sects, in regard to the doctrine of the trinity, is, the latter attach the idea of individual personage to the three, as what they consider a fair logical inference from the doctrines expressly laid down in the Holy Scripture. The people called Quakers, on the other hand, consider it a mystery beyond finite, human conception; take up the doctrine as expressly laid down in the Scripture, and have not considered themselves warranted in making deductions, however specious.

"In the second place, the people called Quakers have always believed in the doctrine of the atonement; that the divine and human nature of Jesus Christ were united; that thus united, he suffered; and that through his sufferings, death, and resurrection, he atoned for the sins of men. That the Son of God, in the fulness of time took flesh, became perfect man, according to

the flesh, descended and came of the seed of Abraham and David; that being with God from all eternity, being himself God, and also in time partaking of the nature of man, through him is the goodness and love of God conveyed to mankind, and that by him again man receiveth and partaketh of these mercies; that Christ took upon him the seed of Abraham, and his holy body and blood was an offering and a sacrifice for the sins of the whole world.

"In the third place, the people called Quakers, believe that the Scriptures are given by inspiration, and when rightly interpreted are unerring guides; and to use the language adopted by them, they are able to make wise unto salvation, through faith which is in Jesus Christ. They believe that the spirit still operates upon the souls of men, and when it does really and truly so operate, it furnishes the primary rule of faith. That the Scriptures proceeding from it, must be secondary in reference to this primary scource, whence they proceed; but as inasmuch as the dictates of the spirit are always true and uniform, all ideas and views which any person may entertain repugnant to the doctrines of the Scriptures, which are unerring, must proceed from false lights. That such are the doctrines entertained and adopted by the ancient society of Friends, and that the same doctrines are still entertained by the Orthodox party aforesaid, to which party this defendant belongs. That these doctrines are, with the said religious society, fundamental; and any individual entertaining sentiments and opinions contrary to all, or any of the above mentioned doctrines, is held not to be in the same faith with the society of Friends, or the people called Quakers, and is treated accordingly." And he further alleges, that previous to the separation, the society became divided into two parties, one of which is called the Orthodox, and the other the Hicksite, and that "they differ essentially from each other in religious doctrines;" and especially with respect to the doctrines above stated. That the Orthodox party hold to them, but that the Hicksite party do not adopt and believe in them, but entertain opinions entirely and absolutely repugnant and contrary thereto.

Decow, in his answer, alleges, that "the society of Friends acknowledge no head but Christ, and no principle of authority

or government in the church but the love and power of God operating upon the heart, and thence influencing the judgment, and producing a unity of feeling, brotherly sympathy and condescension to each other. The great fundamental principle of the society—the divine light and power operating on the soul—being acknowledged by all its members as the effective bond of Union; the right of each individual to judge of the true meaning of Scripture testimony, relating to the doctrines of christianity, according to the best evidence in his own mind, uncontrolled by the arbitrary dictation of his equally fallible fellow man, hath been as well tacitly as explicitly, acknowleged by the society: 1 vol. *Evid.* 43, 45, 51. And that the rules and regulations of the system of discipline, adopted by the society, "relate partly to the preservation of a decent and comely order in its internal polity; partly to the observance of the principles of morality and justice, by all belonging to it; and partly to the maintenance of its peculiar testimonies."

He further alleges, that "the Chesterfield preparative meeting of Friends at Crosswicks, to which he belongs, is the same Chesterfield preparative meeting of Friends at Crosswicks, under whose care the said school fund was placed by the contributors thereto, and are identified with them in due and regular succession, and are a part of the ancient society of Friends. That they believe in the Christian religion, as contained in the New Testament, and as professed by ancient Friends, and adhere to the religious institutions and government of the society of Friends; and bear the same cardinal testimonies to the whole world, as are held most important and characteristic in the said society; among which are, a testimony against war—a hireling ministry—against taking oaths—against going to law with brethren—and a concern to observe the golden rule, do unto all men as we would they should do unto us."

It is perceived, that each party claims for the meeting which appointed him, an adherence to the ancient faith of Friends; although they differ in this, that one points out certain doctrines, which he considers as parts of that faith, and that they are essential parts; while the other, without *directly* denying these to be the doctrines of Friends, or that his party in the society hold

doctrines repugnant thereto, contents himself with alleging that "they believe in the christian religion as contained in the New Testament, and as professed by ancient Friends;" and their adherence to their peculiar testimonies, some of which are specified; and distinctly advances "the right of each individual to judge of the true meaning of Scripture testimony, relating to the *doctrines* of christianity, according to the best evidence in his own mind." And by enumerating the other objects of discipline, he would give us to understand that this is a right, the exercise of which is beyond the control of the discipline of the society.

There is nothing characteristic in "a belief in the christian religion, as contained in the New Testament." All sects of christians, however widely separated, unite in professing this. But if I can understand the liberty claimed in this answer for the members of the society, it is, that they may interpret the Scriptures, in reference to the doctrines of the trinity, and of the divinity and atonement of Jesus Christ, as the light within them shall direct.

But although Decow, in his answer, has, in some measure, declared the faith of the party to which he belongs, yet he denies that this, or any other court, has a right to institute an inquest into the consciences or faith of members of religious associations. But can this denial be well founded. May this fund be divided, and subdivided, as often as this body shall separate. And parts of it, from time to time, be diverted from its declared purpose, and appropriated to the education of the children of persons connected with other religious persuasions, or of no religion at all. And yet that no court can control it? Surely, this cannot be. This trust can be exercised only by a meeting of the *religious society of Friends.* The fund can be *used* only in the education of the children belonging to a meeting of that society. And when, as on this occasion, two distinct bodies, which have separated on points of discipline, or doctrine, or both, come before the court, and each claim the *guardianship* and *use* of this fund, as belonging to the society of Friends; this court may, surely, inquire into the badges of distinction by which the society of Friends are known; and if they are characterized by established doctrines, we may inquire what those are, and whether

they belong to one, or both of these parties. This power is distinctly laid down, in a recent case before the house of lords, in which lord chancellor Eldon says, "It is true, the court cannot take notice of religious opinions, with a view to decide whether they are right or wrong, but it may notice them as facts, pointing out the ownership of property:" 1 *Dow's Rep.* 1; 2 *Jacob and Walk.* 248; 3 *Merrivale*, 412, 419; 7 *Serg. and Rawle*, 460; 3 *Dessaussure*, 557.

In searching for the doctrines of this society, it is, in my opinion, not necessary to inquire whether there were any differences of opinion among their ancient writers, provided the society had for a long time before this fund was established, promulgated as a body, their religious doctrines, and had settled down in harmony under them. It is a body of Friends, with its settled and known characteristics, at that time, which is contemplated in the trust.

The society of Friends, or Quakers, as they were called by their opponents, had its origin in England about the middle of the seventeenth century; a time much distinguished for religious inquiry, in many parts of Europe. It was composed of persons who could not conscienciously agree with the existing sects, in their doctrines, modes of worship, or practices, and who found themselves drawn together by a unity of faith and feeling. They called themselves christians and protestants, but appear to have required from those seeking to become united with them, no formal profession of faith, as a test of principle to qualify them for admission; looking at their works as evidence of their christian faith, and their practice, and support of their peculiar testimonies, as evidence of their Quakerism. As they increased in numbers, and attracted the attention of the civil authorities, their principles became the subject of inquiry, and of misrepresentation, by reason of which, they were exposed to reproach and persecution, and it became necessary for them to come out and avow their leading doctrines to the world. This was done by their leaders and principal men, professing to act in behalf of the society, on several occasions. George Fox, who is generally regarded as the founder of the sect, travelling in the island of Barbadoes, being assailed with these misrepresentations, and especially with

this, that they denied God, Christ Jesus, and the Scriptures of truth; "with some other Friends, drew up a paper to go forth in the name of the people called Quakers, for the clearing of truth and Friends from those false reports." It was addressed to the governor of Barbadoes, with his counsel and assembly. In this paper, the belief of Friends in God, the divinity and atonement of Jesus Christ, and the inspiration of the Scriptures, is most fully and explicitly avowed: 2 vol. *Fox's Jour.* 145, 138, 316, 338, 367; 1 vol. *Ibid.* 4, 56, 57. Elias Hicks intimates that George Fox, for prudential reasons, disguised his real sentiments: 1 vol. *Evid.* 116; 2 vol. *Ibid.* 417. But this ill agrees with the history of Fox, and I suspect with the belief of Friends, as to his real character. Sewell has given his character in this respect, as drawn by a cotemporary, in these words. "He was, indeed, a heavenly minded man, zealous for the name of the Lord, and preserved the honor of God before all things. He was valiant for the truth, bold in asserting it, patient in suffering for it, unwearied in laboring in it, steady in his testimony to it, immovable as a rock:" 2 vol. *Sewell's Hist.* 464.

In 1689, the British parliament passed an act for exempting protestant dissenters from certain penalties, by which the Quakers had suffered for many years. To obtain the benefit of this exemption, they subscribed, among other articles, the following: "I, A. B. profess faith in God, the Father, and in Jesus Christ, his eternal Son, the true God, and in the Holy Spirit, one God, blessed for evermore; and do acknowledge the Holy Scriptures of the Old and New Testament, to be by divine inspiration." The historian adds, "we now see the religion of the Quakers acknowledged and tolerated by an act of parliament:" 2 vol. *Sewell*, 447.

In 1693, the doctrines of the society being misrepresented by George Keith and others, "they found themselves obliged to put forth their faith anew in print, which they had often before asserted, both in words and writing, thereby to manifest that their belief was really orthodox, and agreeable with the Holy Scriptures:" 2 vol. *Sewell*, 471. And being charged with some socinian notions, a short confession of faith, signed by one and thirty persons, of which George Whitehead was one, was, in

December following, presented to the parliament: 2 *Sewell*, 483, 499; 1 vol. *Evid.* 297; 3 *Gough's Hist.* 386. In these public declarations, we find these enumerated doctrines recognized and avowed. At that time, and afterwards, the society of Friends in this country, acknowledged the London yearly meeting as their head, and appeals were taken from their meetings in this country, and decided there: 1 vol. *Evid.* 95; 1 *Proud's Hist. Penn.* 369.

Of their early writers, none seems to have been held in higher estimation than Robert Barclay. In his "Apology,"* purporting to be an explanation and vindication of the principles and doctrines of the people called Quakers, these principles are distinctly exhibited as parts of their faith.

He also published a catechism and confession of faith, which purport to contain "a true and faithful account of the principles and doctrines, which are most surely believed by the churches of Christ, in Great Britain and Ireland, who are reproachfully called by the name of Quakers." In these, the doctrines above mentioned, are most fully and explicitly taught and professed.†

It is in evidence, that Barclay's Apology, and his Catechism and Confession of Faith, purporting as aforesaid, have been published and circulated by the Philadelphia yearly meeting, by the use of its own funds, and as their minutes express, "for the service of truth," as early as the year 1701, and on several occasions since: 1 vol. *Evid.* 76, 297.

There is much other evidence laid before us, by documents and witnesses, confirming that which I have thus briefly noticed. But I shall pass it over, merely referring, however, to the letters from Elias Hicks to Phebe Willis and Thomas Willis, written in 1818, in which he distinctly intimates that the society's belief of the Scriptures, and of the divinity of Christ, which he had been taught from his cradle, whatever was *his* belief at that time, was fully in accordance with the pretensions of the Orthodox party: 2 vol. *Evid.* 419, 420, 421.

* See ninth edition, published at Philadelphia in 1775, pages 86, 139, 141, 185, 203, 204, 211, 226, 572, 573, 574. Also in his "Anarchy of the Ranters," pages 1, 2, 3, 29, 30.

† See pages 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 104, 106, 107, 108, 111, 134.

I think it sufficiently established, that these doctrines have been avowedly and generally held by the society. And, indeed, they have treated the Scriptures with a degree of reverence, uncommon, even among christians. Feeling it presumptuous to speculate upon what is obscure, they have, in *doctrinal matters*, adopted its explicit language, but rejected the ingenious deductions of men; they have been unwilling to be wise above what is written. And in matters of *practice*, they have endeavored to apply its precepts literally; and this is the foundation of their peculiar testimonies.

But are these doctrines *essential?* There is strong evidence of this, in the very nature of the doctrines themselves. When men form themselves into associations for the worship of God, some correspondence of views, as to the nature and attributes of the being who is the object of worship, is necessary. The difference between the pagan, the mahometan, the christian, and the Jew, is radical and irreconcilable. The two latter worship the same God; but one approaches him through a Mediator, whom the other regards as an imposter; and hence, there can be no communion or fellowship between them. Christians have become separated into various sects, differing more or less in their doctrines. In looking at the history of these sects, I am by no means convinced that there was, in the nature of things, any necessity for all the divisions which have taken place. Many of the controversies in the church, have doubtless arisen from minute and subtile distinctions in doctrine, which have been maintained, not only with much ingenuity, but with much obstinacy and pride; and which, by this mixture of human frailty, have been the cause of angry, and often bloody dissensions. And whenever the civil government, or the prevailing party, in a religious society, have formed creeds, and required professions of faith, descending to these minute points, it has necessarily caused the separation of those, or at least the honest part of them, who could not believe up to the precise line of orthodoxy. Hence, no doubt, many separations have taken place in churches, upon points of doctrine, which would never have disturbed the harmony of the association, had not public professions of faith been required, descending into minute and non-essential particulars.

In these days, many christians find themselves able to unite in worship with those of different denominations, and to forget the line of separation between them. But although unnecessary divisions have taken place, it by no means follows, that there are not some points of faith, which must be agreed in, in order that a religious society may harmonize in their public worship and private intercourse, so as to experience the benefits of associating together. Of this description, is the belief in the atonement and divine nature of Jesus Christ. He, who considers Him to be divine; who addresses himself to Him as the Mediator, the Way, the Creator, and Redeemer; who has power to hear, and to answer, to make and to perform his promises, cannot worship with him, who regards Him as destitute of this nature, and these divine attributes. Nor can the latter unite in a worship which he conceives to be idolatrous.

And with respect to the inspiration of the Scriptures. The belief in the divine nature and atonement of Jesus Christ, and indeed of the christian religion itself, is intimately connected with that of the divine authority of the sacred writings. "Great are the mysteries of godliness." And of all the truths declared in Holy Writ, none are more mysterious than the nature, history, and offices of Jesus Christ. The mind that contemplates these truths as based on mere human testimony, must range in doubt and perplexity, or take refuge in infidelity. But if they are regarded as the truth of God, the pride of human reason is humbled before them. It afterwards exerts its powers to understand, and to apply, but not to overthrow them. Faith may repose in confidence upon them, and produce its fruits in a holy life. To a people like the Friends, who pay so much attention to the light within, but who at the same time, acknowledge the deceitfulness of the human heart, and the imperfection of human reason; when they once fix their belief on the testimonies of Scripture, as dictated by the spirit of truth, they necessarily become precious; as the landmarks, setting bounds to principle and to action; as the charts, by which they may navigate the ocean of life in safety; as the tests, by which they may examine themselves, their principles, and feelings, and learn *what spirit they are of*. For, in the language of Barclay, "they are certain,

that whatsoever any do, pretending to the spirit, which is contrary to the Scriptures, should be accounted and reckoned a delusion of the devil." Hence, their book of discipline earnestly exhorts all parents and heads of families, to cause the diligent reading of the Scriptures by their children; (*Disc.* 100;) to instruct them in the doctrines and precepts there taught, as well as in the belief of the inward manifestation and operation of the Holy Spirit upon their own minds; and to prevent their children reading books or papers, tending to create the least doubt of the authenticity of the Holy Scriptures, or of those saving truths declared in them: *Disc.* 12. And hence, by the same discipline, ministers are liable to be dealt with, who shall misapply, or draw unsound inferences or conclusions from the text: *Ibid.* 62. And a periodical inquiry is directed to be made, whether their ministers are sound in word and doctrine: *Ibid.* 95.

I have before said, that their great regard for the scriptures, and desire to comply with them literally, is the foundation of their peculiar testimonies. *These* are acknowledged by Decow and his party to be essential, and a departure from them a ground of disownment: 1 vol. *Evid.* 43, 385. Does not a strong argument result from this, that they regard the Scriptures as divine truth, and that this belief is essential? When their writers would defend these testimonies, they do not refer us to the light within. They do not say that this has taught them that oaths are unlawful, &c. But they point to passage of Scripture, as authority, and *undoubted* authority, on these subjects. But why are they authority? Because they are the truth of man? No. Friends spurn at the dictation of their equally fallible fellow man. But because they are the truth of God. Or, in the language of Fox, "We call the Holy Scriptures, as Christ, the apostles, and holy men of God called them, the words of God: 2 vol. *Fox's Jour.* 147; 1 vol. *Evid.* 78. Can it be that the rejection of, or nonconformity to, particular passages, is ground of disownment, and yet that their members are at liberty to reject the whole? What would this be but to permit their fellow men to select and garble as they please, and dictate what *should be believed*, and what *might be* disbelieved.

These testimonies regard the *practices* of the members. Ro-

bert Barclay did not consider deviations from them, as the *sole* causes of disownment. He says, "we being gathered together into the belief of certain principles and doctrines; those principles and doctrines, and the practices necessarily depending upon them, are, as it were, the *terms* that have drawn us together, and the *bond* by which we become centered into one body and fellowship, and distinguished from others. Now, if any one, or more, so engaged with us, should arise to teach any other doctrine or doctrines, contrary to these which were the ground of our being one, who can deny, but the body hath power, in such a case, to declare this is not according to the truth which we profess; and therefore we pronounce such and such doctrines to be wrong, with which we cannot have unity, nor yet any more spiritual fellowship with those that hold them? And so cut themselves off from being members, by dissolving the very bond by which they were linked to the body: *Anarchy of the Ranters*, 54 to 59. And after proving the soundness of these views from Scripture and reason, he concludes as follows: "So that from all that is above mentioned, we do safely conclude, that where a people are gathered together into the belief of the principles and doctrines of the gospel of Christ, if any of that people shall go from those principles, and assert things false and contrary to what they have already received; such as stand and abide firm in the faith, have power by the spirit of God, after they have used christian endeavors to convince and reclaim them, upon their obstinacy, to separate such, and to exclude them from their spiritual fellowship and communion. For otherwise, if these be denied, farewell to all christianity, or to the maintaining of any sound doctrine in the church of Christ." And, surely, these remarks must be applicable to doctrines as *radical* as those above stated.

In 1722, the yearly meeting of Philadelphia issued a testimony, accompanying Barclay's catechism and confession of faith, which they styled "The ancient testimony of the people called Quakers, revived;" in which, after a long enumeration of evil practices which the apostles testified against, and through which some fell away, they add, "and some others, who were then gathered into the belief of the *principles and doctrines* of the

gospel of Christ, fell from *those principles*, as some have done in our day; in which cases, such as stood firm in the faith, had power, by the spirit of God, after christian endeavors to convince and reclaim these backsliders, to exclude them from our spiritual fellowship and communion, as also the privileges they had as fellow members; which power we know by *good experience*, continues with us, in carrying on the discipline of the church in the spirit of meekness:" 2 vol. *Evid.* 11. And in answer to what was said in argument, as to the *extent* of the discipline appearing in its introductory paragraph, I would observe that this testimony was issued soon after that introduction commences, by referring to it, and may be considered as in a measure explanatory of it. But the discipline itself is not silent on this subject. Its object is declared to be, "that all may be preserved in *unity of faith and practice.*" Now, what is unity of faith? Does it not require unity of *interpretation;* unity of *views*, of the meaning of texts of Scripture, involving important doctrines? It does not require submission to the dictation of others. But it does require an accommodation of opinion to a common standard, in order that they may be of *one* faith. This need not extend to subordinate matters; but liberal as the society has always been in this respect, it has spread before its members the Catechism and Confession of Faith and Apology of Barclay, as guides to opinion, and it will not suffer *even the less essential* doctrines there promulgated, to be questioned, if it be done in a contentious or obstinate spirit, without subjecting the offender to discipline. This is plainly indicated in the *testimony* above referred to: *Disc.* 12. And with respect to the more important doctrines now in dispute, the discipline expressly says, "Should any deny the *divinity of our Lord and Saviour Jesus Christ, the immediate revelation of the Holy Spirit, or the authenticity of the Scriptures;* as it is manifest *they are not one in faith with us*, the monthly meeting where the party belongs, having extended due care for the help and benefit of the individual without effect, ought to declare the same, and issue their testimony accordingly:" *Disc.* 23; 1 vol. *Evid.* 385.

In addition to all this, several respectable witnesses testify that the denial of these doctrines has always been held to be ground

of disownment, and they adduce many instances of actual disownment for these causes: 1 vol. *Evid.* 60, 99, 108, 171, 306.

Upon reviewing the testimony, I am satisfied that the society of Friends regard these doctrines as *essential*, and that they have the power, by their discipline, to disown those who openly call them in question.

But do the Arch street meeting, and its subordinate meetings, hold to these doctrines? It is so alleged; and it is not denied. The denial, if it be one at all, is that these are established doctrines of the society of Friends. The controversies between the parties, so far as they were doctrinal, show that the party called "Orthodox" insisted on these doctrines. The offensive extracts of the meeting for sufferings, declares them: 1 vol. *Evid.* 217; 2 vol. *Ibid.* 414. And these have been published by the yearly meeting of that party, in 1828. And there is much testimony by witnesses, that the Arch street meeting adheres to them, (1 vol. *Evid.* 60, 99,) and none to the contrary.

So that it appears to me, that Hendrickson has sufficiently established that the preparative meeting at Chesterfield, which he represents, may, so far as respects doctrine, justly claim to be of the society of Friends.

But it is insisted, that the other party stands on equal ground in this respect; that they are now, or certainly have been, in unity with that society; a society in which no public declaration of faith is necessary; and that hence, independent of any proof they may have offered, they are to be presumed to be sound in the faith. And that any inquiry into their doctrines, further than as they have publicly declared them, is inquisitorial, and an invasion of their rights of conscience.

If a fact be necessary to be ascertained by this court, for the purpose of settling a question of property, it is its duty to ascertain it. And this must be done by such evidence as the nature of the case admits of: 3 *Merrivale*, 411, 413, 417; 3 *Dessaussure*, 557.

I have already stated, that the answer of Decow appeared to me indirectly to deny that the faith of Friends embraces the enumerated doctrines insisted on by Hendrickson, and to claim freedom of opinion on those points. I feel more assured that this

is the true meaning of the answer, from the course taken in the cross-examination of the witnesses, in which an evident effort appears, to show a want of uniformity among ancient writers of the society, when treating on these subjects; and also, from the grounds taken by the counsel in the argument of this cause. It was here most explicitly, and I may add, most ingeniously and eloquently insisted, not only that these doctrines *do not* belong to the faith of Friends, but that they *cannot;* because they must interfere with another acknowledged fundamental principle of the society—the guidance of the light within. Now if it be established, that these doctrines are part of the religious faith of Friends, can it be necessary, under these pleadings, to *prove* that Decow's party do not hold to the faith of Friends? Decow says, "my party, or preparative meeting, hold the faith of Friends, but these doctrines are no part of that faith; therefore we do not, as Friends, hold to these doctrines." But Friends do hold these doctrines: Decow's party does not; therefore they are not *one*, with Friends, in religious doctrine. And it will not materially vary the argument, that they are *at liberty* to hold them, or not, as the light within shall direct. It is *belief* which gives character to a sect, and right of membership to an individual. *Liberty* has the same practical effect as *unbelief*, when applied to an essential doctrine of a religious society. An individual cannot avail himself of his faith in any doctrine which he is at liberty to believe or not. Were it otherwise, we might all be members of any religious society whatever.

But as I may have mistaken the meaning of Decow's answer, which is certainly not very explicit in this particular, I will next turn to the evidence, and discover, if I can, what is the fair result of the examination of that.

Decow offers no testimony respecting the belief of his party in the particular doctrines in question. His witnesses refuse to answer on these points, (1 vol. *Evid.* 387, 381, 406, 475; 2 vol. *Ibid.* 13, 90, 206,) and his party protest against all creeds, or public declarations of faith, as an abridgment of christian liberty. Having no such public declaration to resort to, we must ascertain the truth from other sources, so far as it is necessary to be ascertained.

Several public addresses were issued by the party called Hicksite, about the time of the separation, setting forth their reasons for it. In that of April twenty-first, 1827, it is declared that, "the unity of this body is interrupted, that a division exists among us, developing in its progress, *views which appear incompatible* with each other, and feelings averse to a reconciliation. *Doctrines* held by one part of the society, and which we believe to be *sound* and edifying, are pronounced by the other part to be *unsound* and spurious." A prominent complaint, in these papers, is, that Friends travelling in the ministry, had been publicly opposed in their meetings for worship, and labored with, contrary to the discipline. Upon looking into the testimony, we find that the prominent individual who furnished occasion for these complaints, is Elias Hicks; and that the interruptions and treatment of him, deemed exceptionable, had their origin in the doctrines which he preached: 1 vol. *Evid.* 308, 474, 478. Can it be denied, then, that differences in doctrine existed, and differences of that serious nature calculated to destroy the unity of the society, and which had their full share in producing the separation which took place.

Decow has introduced several witnesses, who testify, and no doubt conscientiously, that they believe they hold the ancient faith of Friends, but they refuse to tell us what this faith is, in reference to these enumerated doctrines. We cannot give much weight to *opinion*, where we should have *facts*. The belief should refer to specific doctrines, that the court may judge as well as the witnesses, whether it was the ancient faith or not. The court, in that case, would have an opportunity of estimating the accuracy of the knowledge upon which the belief is founded.

How stands the case, then, upon the proofs? A fund was created for the education of the poor children of a certain preparative meeting of the religious society of Friends. That body has lately become separated. *Its unity is broken; the views of its members are incompatible; and doctrines held by one party to be sonnd, are pronounced by the other party to be unsound.* And two distinct meetings exist at this time, and each claims the guardianship and use of this fund. For the safety of the debtor, these parties have been directed to interplead, and to show their

respective pretensions to be *a preparative meeting of Friends.* One of them sets out certain doctrines as characteristic of the society, and that they adhere to them, and that the other party does not. They go on and prove their case, so far as respects themselves. The other party allege that they hold the faith of Friends; but instead of proving it, they call upon their adversaries to prove the contrary. In my opinion, it was incumbent upon each of the parties to make out their case, if they would stand upon equal terms, on this question of doctrine. And especially upon this preparative meeting, connected as it is with a yearly meeting, which, in point of form at least, is not the yearly meeting that was in existence at the creation of the fund; and which has furnished *prima facie* evidence that it has withdrawn, or separated from that meeting, in consequence of disputes in some measure doctrinal. The court will not *force* either party in this cause to declare or prove their religious doctrines. But if doctrines be important, the party which would avail themselves of their doctrines, must prove them. They are peculiarly within their knowledge, and although they may have the right to withhold them, yet if they do, they cannot expect success in their cause. The money must be awarded to that party which supports, by proper proof, its pretensions to it.

Under this view of the case, I deem it unnecessary to attempt any further investigation of the doctrines of the party called Hicksite. And if ascertained, I certainly would not inquire, as an officer of this court, whether they are right or wrong. It is enough, that *it is not made to appear* that they correspond with the religious faith of the society of Friends.

I would merely add, that if it be true, that the Orthodox party believe in the doctrines above mentioned, and the Hicksite party consider that every member has a right to his own belief on those subjects, they well might say that their differences were destructive of their *unity.* If their members and ministers exercise perfect freedom of thought and speech on these points, their temples for worship, and it is to be feared, their own hearts, would soon be deserted by the peace-loving spirit of their Master. There is an essential incompatibility in adverse views, with regard to these doctrines. The divinity of Christ, and the au-

thenticity of the Scriptures, cannot be debated in a worshipping assembly, without defeating the proper purposes of meeting together.

And upon this supposition, too, the *propriety*, as well as *legality*, of this court's noticing the doctrines of the preparative meeting, which is to superintend the expenditure of this fund, is too manifest to admit of doubt. We have already seen, by reference to the discipline of this society, with what earnestness they endeavor to educate their children in the knowledge and belief of the Scriptures; and whoever looks into that discipline, cannot but discover their anxiety to train them up in their own peculiar views of the christian religion. To effect these purposes, their yearly meeting has directed their attention to the subject of *schools*. "The education of our youth," says the discipline, "in piety and virtue, and giving them useful learning under the tuition of religious, prudent persons, having for many years engaged the solid attention of this meeting, and advices thereon having been from time to time issued to the several subordinate meetings, it is renewedly desired, that quarterly, monthly and preparative meetings may be excited to proper exertions for the institution and support of schools; for want of which, it has been observed, that children have been committed to the care of transient persons of doubtful character, and sometimes of very corrupt minds." "It is, therefore, indispensably incumbent on us, to guard them against this danger, and procure such tutors, *of our own religious persuasion*, as are not only capable of instructing them in useful learning, to fit them for the business of this life, but to train them in the knowledge of their duty to God, and one towards another." Under this discipline, and by the exertions of superior meetings, (2 vol. *Evid.* 345, 346, 436, 437,) as well as of the members of the Chesterfield preparative meeting, this school as Crosswicks was established, and this fund raised for its support. It thus appears, that the fund was intended to promote, not merely the secular knowledge of the pupils, but their growth in the religious principles deemed fundamental by this people; or at least, to prevent, through the instruction of teachers of other religious principles, or wholly without principle, the alienation of the minds of their children

from the faith of their fathers. Could these meetings, and these contributors, have contemplated that this fund should fall into the hands of men of opposite opinions, or of no opinions? Could those men, who acknowledged the obligation of this discipline, enjoining, as it does, upon parents and heads of families, "to instruct their children in the doctrines and precepts of the christian religion, as contained in the Scriptures," and "to prevent their children from having or reading books and papers, tending to prejudice the profession of the christian religion, or *to create the least doubt concerning the authenticity of the holy Scriptures,* or of those saving truths declared in them, lest their infant and feeble minds should be poisoned thereby;" I say, is it possible such men could have expected that their children should be taught by Elias Hicks, that the Scriptures "have been the cause of four-fold more harm than good to christendom, since the apostles' days;" and that "to suppose a written rule *necessary,* or *much useful,* is to impeach the divine character?" Or, that they should be taught by him, or by any one else, that each individual must interpret them for himself, entirely untrammelled by the opinions of man; and that the dictates of the light within are of paramount authority to Scripture, even when opposing its precepts? Surely this would be a breach of trust, and a perversion of the fund, which the arm of this court not only has, but ought to have, power to prevent.

I would not be understood to impute the doctrines of Elias Hicks to that party which unwillingly bears his name. Nor do I mean to intimate that *they* would abuse this trust. But I have endeavored to show, that doctrines may justly have an influence on the decision of the question now before us. And without coming to any conclusion with respect to *their* doctrines, I am of opinion that this fund should be awarded to that meeting which has shown, at least to my satisfaction, that they agree in doctrine with the society of Friends, as it existed at the origin of this trust.

I do, therefore, respectfully recommend to his excellency the chancellor, to decree upon this bill of interpleader, that the principal and interest due on the said bond, of right belong, and are payable to, the said Joseph Hendrickson; and that he be permit-

ted to proceed on his original bill of complaint, or otherwise, according to the rules and practice of the court of chancery.

GEORGE K. DRAKE.

THE CHANCELLOR decreed accordingly, in favor of Hendrickson the complainant, for foreclosure and sale of the mortgaged premises, according to the prayer of the original bill.

CITED *in Den, Amer. Primitive Soc.* v. *Pilling*, 4 *Zab.* 677; *Exr. of Condict* v. *King*, 2 *Beas.* 333; AFFIRMED, *Hal. Dig.* 219.

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CHRISTIAN WANMAKER, HENRY R. WANMAKER AND DAVID I. CHRISTIE, EXECUTORS OF RICHARD D. WANMAKER, DECEASED, v. CORNELIA VAN BUSKIRK, PAUL VAN BUSKIRK, A MINOR, STEPHEN HEMMION AND HANNAH, UX., HARMANUS, GOETCHIUS, AND FANNY, UX., AND WILLIAM W. RAMSAY AND MARGARET, UX.

The testator was accustomed, upon the marriage of his daughters, to advance to their husbands one hundred and fifty dollars each, and take from them an obligation for the payment of the same, without interest; with an understanding, that it was to be collected for the benefit of the children of his said daughters in case their husbands survived them; but if the wife survived the husband, payment was not to be required of his representatives, and the obligation was to be considered as cancelled. This was strictly an advancement; a gift to be accounted for, as part of the share of the daughter, to preserve equality in the distribution of the testator's estate.

This cannot be considered a debt, the money not being wanted to satisfy claims against the estate; but the daughter having survived her husband, and the testator having devised all his personal property amongst his children, equally; to preserve such equality, this advancement must be brought in by the executor as constituting part of the estate.

But though a bond taken for this advancement, and including a farther sum paid by the testator for his son-in-law, be secured by a mortgage on his real estate, which descended to his children; it is not necessary that the money should be collected on the mortgage, merely to be paid over to the widow: the executor may consider it as part of her share of her father's estate.

*Semble.* That an advancement bears no interest.

A bond and mortgage, being sealed instruments, import, *prima facie*, a valuable consideration; yet the defendants are at liberty to inquire into the consideration; but the *onus probandi* is on them, and unless they can impeach it, the instruments must stand.

Connected with the facts, that no interest was paid and no demand made, length of time may be set up to show that nothing was due, as well as to raise a presumption of payment.

A non-claim for *twenty years*, when the parties are in the way and there is opportunity for asserting the demand, is strong evidence against the existence of a debt.

Still it is but a presumption; and the fact that the parties interested were nearly related, and the collection of the money might have occasioned distress, and even the payment of interest inconvenience, taken in connection with the fact, that part of the money included in the mortgage was an advancement, and not to be repaid, is sufficient to repel it.

To authorize a court to say, from mere lapse of time, unless very extraordinary, that a debt never existed, there should be no repelling or explanatory circumstances: it requires a stronger case than one which will justify the court in deciding that a debt, once due, has been satisfied or released.

Yet where length of time is relied on as evidence of payment, it may be repelled by showing that the party was a near relation, or was insolvent.

The statute of limitation does not, in its terms, apply to courts of equity; but they have always felt themselves bound by its principles, and, except in matters of strict trust, and matters purely equitable, have acted in conformity with them.

If for a debt on simple contract, the creditor chooses to go into a court of equity, the defendant shall have the benefit of the statute in that court, as well as a court of law.

As to mortgages, the presumption of payment may be raised by lapse of time without interest being paid or demanded; but what shall be a sufficient length of time to raise such presumption has not been clearly settled.

The better opinion appears to be, that such a presumption would attach at the end of *twenty years* without payment or demand of principal or interest; but admitting this to be the rule, it is but a presumption, and may be repelled by a variety of circumstances.

The situation of the parties, the mortgagor having married the daughter of the mortgagee, and had issue, is, of itself, sufficient to repel the presumption.

As to the declarations of a deceased party, the evidence of one having better opportunity of information, and to whom the deceased, from his intimate connexion, would have been more likely to have communicated freely, is entitled to greater weight than that of a stranger.

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The pleadings present the following case. The complainants seek to recover upon a mortgage, given by Paul Van Buskirk, in his life-time, to Richard D. Wanmaker, the testator, in the penal sum of seven hundred and seventy-four dollars and seventy-two cents, conditioned for the payment of three hundred and eighty-seven dollars and thirty-six cents, in one year from the date, and

dated on the 1st day of May, 1806. They allege that upon this mortgage nothing has been paid for principal or interest; and that the mortgage itself is unsatisfied and in force.

The defendants are the heirs at law of the mortgagor, and they resist the payment of the mortgage on a variety of grounds.

In the first place, they deny that there was any thing due on the mortgage at the time of the testator's death, or that it was originally taken for the purpose of securing any actual claim against the mortgagor. They allege that Paul Van Buskirk, the mortgagor, now deceased, married Catharine, a daughter of the said Richard D. Waumaker, the mortgagee; that the said Richard was accustomed, upon the marriage of his daughters, to advance to their husbands one hundred and fifty dollars, and take from them an obligation for the payment of the same, without interest; with an understanding that it was to be collected, for the benefit of the children of his said daughters respectively, in case their husbands survived them; but if the wife survived the husband, the payment was not to be required from their representatives, but the obligation was to be considered as cancelled. That one hundred and fifty dollars of the money mentioned in the mortgage, was for the advance made by the said testator to his son-in-law, at the time of the intermarriage with his daughter. That the mortgage was taken, as they have always understood, to secure the property for the benefit of the said daughter and her children; and to prevent the said Paul Van Buskirk, who was an intemperate man, from squandering it; and that there was never any thing actually due upon it.

In the second place, they set up the statute of limitations in bar of the claim, and pray the benefit of it, as though it had been pleaded.

Again, they allege that as the mortgage bears date on the 1st of May, 1806, and the money mentioned in it was payable on the 1st day of May, 1807; and as no payment has ever been made on the mortgage; and the mortgagor, and those holding under him, have always been in the peaceable and quiet possession of the premises; it is to be presumed that the mortgage has been in some way released or satisfied, or that it was taken and held for some purpose other than the security of money.

Depositions and proofs were taken, which are noticed in the opinion of the court. The cause was argued by

*P. Dickerson*, for complainants;

*J. C. Hornblower*, and *E. B. D. Ogden*, for defendants.

Cases cited:—1 *Eden*, 358; 7 *John. C.* 113; 1 *Paige C.* 239; 6 *John. C.* 266; 2 *John. C.* 750; 1 *Paige C.* 100; 10 *Wheat. R.* 168, 177, *n.*; 3 *Bro. C. C.* 289; 5 *John. C.* 545; 16 *John. R.* 214; 9 *Wheat.* 490, 497; 2 *Jac. & Walk.* 227.

THE CHANCELLOR. The evidence taken in this case shows conclusively, that it was the custom of Mr. Wanmaker, the testator, to advance to his daughters, on their marriage, the sum of sixty pounds, or one hundred and fifty dollars; and there can be no doubt that this amount was advanced to Van Buskirk, the mortgagor, and husband of his daughter Catharine. It was his practice also, to take something to show for the advancement, that his estate might be thereafter the better equalized and settled among his children. He gave one hundred and fifty dollars to Andrew Hemmion, who married the eldest daughter, and took from him a bond for the payment of it. He told Garret W. Hopper that he meant to do the same by his other daughters when they married; and we find that when David I. Christie married another daughter, he gave bond for the like sum advanced to him. He afterwards told John Maysinger, another witness, that he had given to each of his daughters sixty pounds. The evidence shows, also, that this sixty pounds was included in the mortgage; and the reason for taking the mortgage, was, that the property might be saved for the family, as Van Buskirk was a drinking man and might spend it.

This was strictly an advancement; a gift to be accounted for; or, as the testator expressed it, a part of the share of his daughter. It was a family arrangement by no means uncommon in our state, entered into with proper motives, designed to advance the welfare of all, and to preserve that equality which is so necessary to the peace of families. It cannot be considered as a debt, especially in this case when it is not wanted for the pay-

ment of any claims against the estate. If this were a case in which creditors were interested, it might present a different question.

The bond was, nevertheless, rightly brought into the estate by the executors. For certain purposes, it must be considered as constituting a part of the estate. The testator, by his will, divided all his personal property among his children equally. To produce this equality, it is necessary that the advancements be brought in: and such was the intention of the testator. But there is no necessity that the money be collected upon this mortgage, which is only a collateral security. The mortgaged premises have descended to the children of the mortgagor; and it might be unjust for them to pay this money into the estate, merely that it may be paid over to the widow of the mortgagor. The executors will consider it as part of the share of Catharine the daughter; and if she should refuse to receive it as such, the complainants have another remedy.

The principal question in this controversy relates to the residue of the consideration money mentioned in the mortgage.

The defendants contend that it was never due; that there was no indebtedness on the part of Van Buskirk; and, of course, that the mortgage was voluntary, and cannot now be enforced against this property. This allegation must be satisfactorily sustained on their part. The bond and mortgage are sealed instruments, and of themselves import, *prima facie*, a valuable consideration. The defendants are at liberty to inquire into this consideration. But the *onus probandi* is upon them, and unless they can impeach it, the instrument must stand.

Several circumstances are relied on by the defendants as raising a strong presumption that the mortgage was intended simply to cover the property. Among them are these: that the mortgage was not executed by the wife of the mortgagor; that the mortgagor always remained in possession of the mortgaged premises; that there was no demand of payment; and that no interest was ever paid. All these are susceptible of very reasonable explanation. The security was ample for the amount, without the concurrence of the wife in the mortgage, and as she was a daughter of the mortgagee, the omission is very readily accounted for.

The fact that the mortgaged premises remained in possession of the mortgagor, is not entitled to much weight; of itself it proves nothing, for this is the uniform practice of the country. The only circumstances that are calculated to create any thing like doubt, are the lapse of time, connected with the facts that no interest was paid and no demand made. Length of time may be set up to show that nothing was due, as well as to raise a presumption of payment: *Christophers* v. *Sparks*, 2 *J. & W.* 233. And it is well remarked by the court in that case, that a non-claim for twenty years, when the parties are in the way, and there is every opportunity for asserting the demand, is strong evidence against the existence of a debt. Still it is but a presumption; and the fact that in this case the parties interested are nearly related, and that the collection of the money might have occasioned distress, and even the payment of interest inconvenience; taken in connection with the circumstance that a part of the money mentioned in the mortgage was an advancement, and not to be paid, is sufficient to repel it. To authorize a court to say, from the mere lapse of time, unless that lapse should be very extraordinary, that a debt never existed, there should be no repelling or explanatory circumstances. It requires a stronger case than one which will justify the court in deciding, that a debt once due has been satisfied or released. And yet, in cases where length of time is relied on as evidence of payment, it may be repelled by showing the fact that the party was a near relation: *Hillary* v. *Waller*, 12 *Ves.* 266.

The defendants insist, however, that there is direct evidence to prove that nothing was ever due. It is shown, that Van Buskirk was an intemperate man. That the old gentleman, his father-in-law, should distrust him, and take some measures to secure the property for the family, is not at all unnatural. He well knew, that intemperance was the precursor of profligacy, degradation and ruin. The evidence of Garret W. Hopper explains why the mortgage was taken. It was that Van Buskirk should not make away with it in a drunken frolic; but it does not prove that the mortgage was voluntary and without consideration. Wanmaker told Hopper, that he had taken a mortgage from Van Buskirk on the whole of his land, to save the property

for his wife and children. This does not necessarily mean that there was nothing due on the mortgage; it may well mean that he had, in addition to the bond for the money due, taken a mortgage on the property, which he would not have done, but for the fear that Van Buskirk would part with his property, and his family be turned out of doors. The testimony of Maysinger is susceptible of the same explanation. And although Garret M. Van Riper swears expressly, that Wanmaker told him his son-in-law did not owe him any thing, but he kept the mortgage for the children; yet I think that evidence, considering the circumstances under which it was given, is entirely overcome by that of Andrew Hemmion, who had been connected in the family, and was necessarily acquainted with its concerns, and to whom Wanmaker would be more likely to communicate on such a subject, than to a stranger. He told Hemmion that he had advanced more money to Van Buskirk; that he had helped him to money several times, and had taken a mortgage to secure the whole.

Taking all the testimony together, it is at best of doubtful character; and I do not feel willing, upon the strength of it, to declare the mortgage void for want of consideration.

The defendants insist, in the next place, that from the lapse of time the mortgage must be presumed to be paid and satisfied.

The mortgage was given on the 1st of May, 1807. The bill was filed on the 29th of March, 1830; making a period of nearly twenty-three years, during which no interest was paid, nor was the money ever demanded so far as is known.

The statute of limitations does not apply, in terms, to courts of equity; but it is well known, that they have always felt themselves bound by the principles of the statute; and except in cases of strict trust, and matters purely equitable in their nature, have acted in conformity with them. With respect to debts on simple contract, if they can be enforced in equity as well as at law, and the creditor chooses to go into a court of equity, the defendant shall have the benefit of the statute of limitations in that court as well as in a court at law. In such cases, the law of both courts is the same, and justly so, for otherwise the statute might be eluded: *Roosevelt* v. *Mark*, 6 *John. C. R.* 266.

As it regards mortgages, the presumption of payment may be raised by lapse of time, without interest being paid, or demand made; but what shall be a sufficient length of time, has not been clearly settled.

In *Hele* v. *Hele*, 2 *Ch. Ca.* 28, a mortgage sixty years old was held to be satisfied; but there were circumstances to induce a presumption that it was paid. In 1 *Ch. Ca.* 59, *Sibon* v. *Fletcher*, the court presumed payment of a mortgage after a much shorter period, on the particular circumstances of the case. The point was raised in *Leman* v. *Newnham*, 1 *Ves.* 51, which was a suit for foreclosure. The defendant insisted, that as there had been no payment of principal or interest for twenty years, the presumption was that the mortgage was satisfied, and likened the case to an ejectment. Ld. Hardwicke said, that in common cases it was so, but not in mortgages, because the mortgagee shall be supposed continuing in possession, and the mortgagor's possession shall be his, being tenant at will to him. He said also, there was strong evidence that the money had not been paid. The next case was *Toplis* v. *Baker*, in the exchequer, 2 *Cox*, 118. The court there said, there was no general rule for presuming a mortgage satisfied from the non-payment of interest for twenty years. In *Trask* v. *White*, decided in the court of chancery (3 *Bro. C. C.* 289,) Ld. Thurlow appeared to be of opinion, that where it was clear interest had not been paid for twenty years, and no demand made, he had always understood it raised the presumption that the principal was paid. In that case, he thought the presumption on a mortgage as strong as that at law. The cause was not decided upon that point, but it was referred to a master to inquire whether any interest had been paid. The master of the rolls, in *Christopher* v. *Sparks*, already cited, (2 *J. & W.* 235,) holds the opinion, that twenty years non-claim is strong evidence even against the existence of a debt. In reviewing the cases, he questions, and I think very justly, the doctrine held in *Toplis* v. *Baker*, and *Leman* v. *Newnham*, that a presumption of payment would not attach in favor of a mortgagor in possession, because he is considered tenant at will to the mortgagee; and supports the doctrine of Ld. Thurlow, that mortgages and bonds stand on the same footing

in respect to the presumption arising from non-payment of interest.

In New-York, chancellor Kent decided that a mortgage of forty years standing, on which there had been neither payment nor demand of interest, should be presumed satisfied: *Giles* v. *Baremore*, 5 *John. C. R.* 545.

From all these decisions, there can be no doubt that a presumption of payment may be raised by lapse of time, against a mortgage; and the better opinion would seem to be, that such presumption would attach at the end of twenty years, by analogy to the rule relating to bonds. Chancellor Kent, in the case cited, appears to favor this opinion, and to incline, with the master of the rolls in the case of *Boehm* v. *Wood*, to put the mortgagor and mortgagee, when in possession, in the same plight. The rule of presumption has long been adopted in favor of the mortgagee; so that when he has been in possession twenty years, the mortgagor will not be let in to redeem.

I see no objection to the adoption of a rule by this court, that a lapse of twenty years, without payment or demand of principal or interest, shall raise a presumption of payment in the case of a mortgage. Our statute bars the recovery of the debt after sixteen years; and after twenty years the right of entry is gone, and the mortgage is no longer a subsisting title; why should the mortgage still be valid in a court of equity? But I am not called on to establish such a principle, or to say that the English doctrine is strictly applicable here. Admitting it to be so, and this case to be within it, it does not determine the rights of the parties. It raises a presumption that the mortgage is satisfied; and I am willing to admit that such presumption is raised in favor of the payment of this mortgage, by the lapse of twenty-three years without payment or demand of interest. It is, nevertheless, but a presumption. Standing alone, without explanation, it would prevail, and be tantamount to absolute proof, as well in equity as at law; and this, not because of any actual belief that the debt has been paid, but because it is right that possession should be quieted. But the presumption may be repelled by a variety of circumstances; and it remains to be seen whether there are any of sufficient weight to destroy it. Upon

this part of the case I entertain no doubt. The very situation of the parties is of itself sufficient to my mind. The mortgagor was a near relative; he had married the daughter of the mortgagee, and had issue. According to Ld. Erskine, in *Hillary* v. *Waller*, 12 *Ves.* 265, that alone was sufficient. The mortgagor died many years ago, leaving his wife and children in possession. They were not in a situation to pay either principal or interest. To have exacted the payment, might have brought distress upon those who depended on this property for a support, and would have been harsh, to say the least of it. To suffer the mortgage to remain without compelling payment, was a reasonable indulgence, and ought not to be set up now for the purpose of defeating the claim. One ground for a presumption of payment, growing out of a lapse of time, is that a man is always ready to enjoy what is his own. Whatever will repel this, will take away the presumption of payment; and for this purpose it has been held sufficient that the party was insolvent, or a near relation.

Without adverting to other circumstances that might be adduced, I feel satisfied to declare the mortgage a subsisting lien on the property, and that the complainants are entitled to recover.

Let an account be taken of the sum due.

CITED *in Batton* v. *Allen*, 1 *Hal. Ch.* 104; *Evans* v. *Huffman*, 1 *Hal. Ch.* 360; *Conover* v. *Wright*, 2 *Hal. Ch.* 615; *Hayes* v. *Whitall*, 2 *Beas.* 242; *Marsh's Ex'r* v. *Oliver's Ex.*, 1 *McCar.* 262; *Cowart* v. *Perrine*, 3 *C. E. Gr.* 457; *Barned* v. *Barned*, 6 *C. E. Gr.* 246.

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## JASPER S. SCUDDER v. THE TRENTON DELAWARE FALLS COMPANY, WILLIAM PERSE, AND ELAM T. BALDWIN.

The power of a court of equity to interpose by injunction in cases of waste, private nuisance, and great and irreparable injury to the inheritance, is well established. It does not rest on modern or questionable decisions, but is ancient, uniform, and not now to be shaken.

The late cases have so construed this power as to embrace trespasses of a continuous or extraordinary character; and have gone upon the ground, that the property to be protected was of peculiar value, for the injury or destruction of which a recompense in damages could not be made.

The complainant is in possession of a farm on the river Delaware. The house stands on the bank, not far from the commencement of the declivity. The bank, along which the water sweeps when the river is full, is a green bank;

the upper part of which, through the whole extent of the farm, is covered with a grove of trees. The lower part, from the water's edge to the height of ordinary freshets, and to the roots of the trees, has been secured by covering it with stones; by means of which, in connexion with the trees, the bank is at present effectually secured. In constructing the raceway of the Trenton Delaware Falls company, to create their water power, as located, this green bank, part of which is immediately in front of the dwelling-house, must be cut down, and the trees destroyed; which will greatly expose the property to the encroachments of the river. This will be a lasting injury to the inheritance: it forms a clear case of waste, over all which cases the court has an undoubted jurisdiction.

Considering this in the light of a trespass, it is not an ordinary case, where the damage is temporary, or of such a character as to admit of full compensation. The company seek to take entire possession of this part of the property; appropriate it permanently to their own use, and place it beyond the power or control of the complainant. This would be a complete severance of this part of the estate from the residue, and destruction of it in the character in which he now enjoys it: this court has authority to interpose its arm to prevent such an act.

If the complainant has lain by and slept over his rights; has seen the defendants making contracts, and expending large sums of money, in the prosecution of their works, and taken no steps to restrain them; it is fatal to the application. It is a law of the court, and dictate of sound reason, that when a party desires extraordinary aid, he must be prompt in his application.

But when the complainant did not consent to give his land, made no agreement with the company, and commissioners were appointed, who made an appraisement, and the amount was tendered him, which he refused to accept, and gave notice to the company that unless they paid him what he was willing to receive for the property, he would contest the validity of their proceedings; it was not necessary for him to do more until his rights were invaded.

In all cases where a corporation exceed the limits of the power given them, or abuse or misapply it, the court will interfere: but it will not give its aid, where the powers granted have been exercised in good faith; or where they are discretionary, or where the right is doubtful.

Private property cannot be taken for *private* use. The legislature have no right to take the property of one man and give it to another, even upon just compensation made.

The right of the state to take private property for public use, making just compensation, is a right appertaining to sovereignty, which the state may freely exercise on all proper occasions, and which a jury has no power to control.

This right (of taking private property for public use) was originally founded on *state necessity*. In process of time the right has been more liberally construed; the term *public use* has been substituted; and what shall be considered as public use, is, under the decisions of our courts, an unsettled question. What shall be a *public use* or *benefit*, may depend, somewhat, on the situation and wants of the community for the time being.

This right is not limited to the actual use and occupation of the property by the state; for private property is taken, in many instances, where the state in its sovereign capacity does not and cannot occupy it. It is not limited to public political corporations; for the right of private corporations, to take private property, for a variety of purposes, such as canals and railroads, is not disputed at this day.

The legislature, in this state, is not omnipotent, as the British parliament. The provisions of the constitution are paramount to the power of the legislature; and whenever the legislature, in the exercise of its authority, transcends the limits clearly prescribed to it by the constitution, its acts are void; and it is the duty of the judiciary to declare them so.

The constitution provides "that the common law of England, as well as so much of the statute law as have heretofore been practiced in this state, shall remain in force until altered by the legislature, &c., and that the inestimable right of trial by jury, shall remain confirmed as a part of the law of this state without repeal for ever." These words of the constitution are fully satisfied, by preserving the trial by jury in all criminal cases, and all trials of right in suits at common law.

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This bill is filed to procure an injunction, restraining the defendants from entering upon the property of the complainant, for the purpose of cutting and constructing a raceway to conduct water from the river Delaware to a point below the Trenton Falls; the right to cut and construct which raceway is claimed by the Trenton Delaware Falls company for themselves, and for the said William Perse and Elam T. Baldwin as their agents, in virtue of an act of the council and general assembly of this state, entitled, "An act to incorporate a company to create a water-power at the city of Trenton and its vicinity, and for other purposes," passed the 16th of February, 1831.

After setting forth the act, or such parts of it as were deemed material, the complainant proceeds to state, that the capital stock was subscribed, and thirteen managers appointed; that these managers, under color of the act, have caused a survey and report to be made and filed of the location of the wing-dam and raceway, according to which the route passes through and over the farm of the complainant, near to his dwelling-house, and so as to occasion serious and lasting injury to his interests. That the said company, without making any compensation or offer of compensation to the complainant, caused a survey and map to be made, of so much of the said land as was intended to be appropriated by them, and exhibited them to the chief justice of

the state, who thereupon appointed three appraisers, who in September, 1831, proceeded to make an appraisement, of the value of the complainant's lands to be appropriated as aforesaid, and of the damages to be sustained by him in consequence thereof. That the appraisers proceeded to make the appraisement, and after having made it, the company tendered to the complainant the sum of four hundred and fifty dollars, as the amount of his damages, which he declined to receive; the same being, as he alleges, utterly inadequate, as a compensation for the value of his land and damages. That afterwards the said company, by themselves and their agents, entered upon the land of the complainant, and proceeded to fell and destroy the timber and trees there growing. That upon being warned against any further proceeding, they desisted from committing further waste, but threaten that they will at their leisure enter again on the property, and proceed to excavate and form the raceway thereon; which raceway, if formed, would be a great and irreparable injury to the inheritance, by destroying the timber and trees growing upon the bank of the river Delaware, which form a natural and sure protection for said bank against the effects of ice and freshets; by intercepting his ready communication with the river; by depriving him of a valuable portion of his farm, and by destroying his fishery.

The complainant then charges, that the said act, so far forth as any authority is given thereby to the defendants to enter upon and take the land and property of the complainant for the purposes aforesaid, without making and tendering an adequate compensation, and without the consent of the complainant, is unconstitutional and void; the same not being taken to answer any state necessity, nor for the benefit of the community at large, nor for any public use whatsoever, but solely for the private gain and emolument of the said company.

The complainant then further charges, that the said act, so far forth as it assumes to vest the right, property and interest of the complainant in and to his lands, in the company, without a just compensation therefor, and without an opportunity of having the said compensation ascertained by a jury, is unconstitutional and void: and prays that the said act may be so declared by the

court, and that the defendants may be restrained from again entering upon the premises and committing waste thereon.

To this bill an answer was filed by the company under their corporate seal, and by William Perse and Elam T. Baldwin, the other two defendants, under their oath; which, with some affidavits, were read and used at the hearing. They do not so materially vary the case made by the bill, as to render it necessary to spread out their contents. They are adverted to in the discussion of the case, and receive due attention, so far as they bear upon the points coming under consideration.

*W. Halsted*, for the complainant. The application is for an injunction against the Trenton Delaware Falls company, to prevent their injuring the complainant's property, and to test the constitutionality of their charter. We allege that the act is for private purposes, and designed to take private property for private use; and that, upon an assessment by commissioners, appointed by a justice of the supreme court, without the intervention of a jury.

This company was incorporated to create a water power, for manufacturing purposes. It is strictly a private corporation, and entitled to none of the privileges of a public corporation: *Angell and Ames on Corp.* 22; 4 *Wheat. R.* 668; 9 *Cranch's R.* 52; 2 *Kent's C.* 222.

We admit that private property may be taken for public use, making just compensation: but in this case, the property is not taken for public use or state necessity, but for private purposes. Highways are necessary for public use; turnpikes, railroads and canals are highways, upon which all persons may travel, paying the prescribed tolls. They are for public use: 2 *Bay's R.* 46, 54. But this water power is for the benefit of the stockholders alone. No one has a right to use it without the consent of the company. They may occupy it all themselves, or sell or let out the privilege of using it, at what price they please. By the act, the state have a right to subscribe, and become a party, or stockholder in the company; but that does not alter the case: 9 *Wheat. R.* 907; 2 *Ang. and Ames*, 22, 8. It would still be a private corporation, and the property taken would be taken for private use. If the

object of this incorporation is for public use, what neighborhood improvement is not for public use? The water power will be private property; does it depend on the extent of it, whether it will be for public or private use? It is said it will be sufficient for seventy mills: how many mills will make it for public use? If seventy, why not a less number; why not one? The erection of one mill, in certain situations, is a great public benefit; particularly in the first settlement of a country. But can the legislature authorize a company to take private property to erect a mill? A blacksmith's shop is, in one sense, for public use. It is necessary to agriculture and other branches of industry. Inns and taverns are for public use expressly, and they are regulated by general laws; yet the property of A. cannot be taken without his consent, and given to B. to erect a blacksmith's shop or tavern? If not, why can it be taken to erect a mill, or any number of mills? The legislature might have authorized a company to purchase and hold property for manufacturing purposes, as was done in the charter of the society for establishing useful manufactures at Paterson: but in authorizing them to take private property, without the consent of the owner, for such purposes, they exceeded their constitutional powers and the act is void.

It is contrary to the spirit, if not the letter, of the constitution of the United States; which provides, that private property shall not be taken for public use, without just compensation: *a fortiori*, it cannot be taken for private use at all. It may be considered contrary to the constitution in another respect: it impairs the obligation of contracts. A. purchases land, with covenant of warranty. It is taken, without his consent, and is given to B. He might have remedy on his covenant, but is cut off by the act of the legislature: 6 *Cranch's R.* 177; 9 *Cranch*, 43, 292; 8 *Wheat. R.* 464, 481; 4 *Wheat.* —, (*Dartmouth College*); 7 *John. R.* 502; 2 *Gallis. R.* 139, 144.

But if the object of this charter can be considered for public use, in such sense as to authorize the taking of private property without the consent of the owner, it must be done on just compensation made; and the amount of that compensation can only be ascertained by the intervention of a jury; for which the act makes no provision. Our state constitution adopts the common law of Eng-

land, and provides, "that the right of trial by jury shall remain confirmed as a part of the law of the land, without repeal, for ever." By the common law, the compensation to be made for private property taken for public use, could only be ascertained by a jury, on a writ of *ad quod damnum*.

In England, where the parliament is omnipotent, they have ever respected this great principle of the common law; and never attempted to take private property for public use, without the intervention of a jury: 2 *Bay's R.* 55, refers to stat. 29 *Geo. II.* (1755,) which requires a jury to assess damages for land taken for a public bridge. The statutes 5 *Geo. III. c.* 50, *s.* 14; 7 *Geo. III. c.* 42, *s.* 12; 10 *Geo. III. c.* 25, and 13 *Geo. III. c.* 78, *s.* 16, make the same provision in case of taking land for public highways; and 7 *Geo. III. c.* 51, in case of a canal. The British parliament have never undertaken to do what our legislature have done in this instance; they have always provided for the intervention of a jury. I refer to 8 *John. R.* 433; 2 *Peters' R.* 645, as to the mode of proceeding in England, in taking private property; and 2 *Peters' R.* 656–7–8, as to the constitutional powers of the legislature.

In England, private property is sacred: it cannot be taken but for public use, and on compensation made; and that compensation must be ascertained by a jury: 1 *Blac. C.* 138–9, *n.* 15; *Fitzherb. N. B.* 509, 516. The same principle has been recognized in this court, by the late chancellor, in the case of the *Society at Paterson* v. *The Morris Canal*, and has been sanctioned by judicial decisions of high authority in this country. In 2 *Bay's R.* 38, it was admitted by the counsel on both sides. In *Vanhorne's lessee* v. *Dorrance*, 2 *Dal. R.* 310, Paterson, J., said, there were only three ways in which the state could take lands: 1. By agreement of parties; 2. On assessment by commissioners mutually chosen; and, 3, by jury.

To take private property for the purposes, and in the manner, prescribed by this act, is contrary to the principles of our state institutions. See the constitutions of *Massachusetts*, *New-Hampshire*, *Vermont*, *Pennsylvania*, *Delaware*, *Maryland*, and *Kentucky*. Under monarchical governments, where all power resides in the crown or parliament, if the people claim a right,

they must show it. But under our government, where the power resides in the people, it is the reverse. The constitution has set bounds to legislative authority. All power not delegated to them, is reserved to the people; and if the government claims a right, they must show it: *Delolme Const. Eng.* 316; 6 *Dane's Ab.* 431; *Federalist, No.* 49, 84, 273, 464.

It is contrary to natural justice: 1 *Bay's R.* 98; *Opinion of Marshal, J.*, 6 *Cranch's R.* 135–6.

It is contrary to the law of nature and nations; the civil law, and, I may add, the divine law: *Dig. Pand. Justin.* 170; *Grotius*, 1 *vol.* 120, *B.* 1, *c.* 3, *art.* 6, *s.* 4; *Ibid.* 467, *B.* 2, *c.* 14, *a.* 7, 8; 2 *vol.* 947, *B.* 3, *c.* 20, *a.* 3, *s.* 2, 3, and note to *B.* 1, *c.* 1, *s.* 6—all go on what Grotius calls the *eminent domain*, and the owner is to be indemnified out of the public funds. Puffendorf calls this eminent domain, the *sovereign transcendent propriety*, and says this propriety never takes place, but in extreme necessity and emergencies. In the divine law there is one case, 1 *King's*, *c.* 21; the vineyard of Naboth. There private property could not be taken for private use by a sovereign prince. There is no instance of it under Turkish despotism: 2 *Bay's R.* 60: The mufti told the sultan Mustapha, that the laws of the prophet forbade his taking private property; and shall it be done in this christian country, and that without the intervention of a jury?

The whole history of our legislation is based on this principle, that a jury is necessary: *Leam. and Spi.* 428: it must be by judgment of peers, or according to the laws of England. This has been the uniform course in New-Jersey, from the adoption of the constitution until the Morris Canal company obtained their charter: that was the first innovation. The act incorporating the society at Paterson, passed in 1791, provided for a jury. The same provision is contained in the turnpike and railroad laws, from 1801, when the first turnpike act passed, to 1831, when the Paterson and Hudson river railroad, and the Elizabeth-Town and Somerville railroad acts passed.

The constitution contains no express provision for this particular case. The provision is general. It adopts the common law of England, of which the principles we contend for are a part:

and guarantees the right of trial by jury, which it calls inestimable. If it is so between parties standing on equal grounds, it is much more so where the weight and influence of the state, a corporation, or an interested community, is thrown into the scale, against a solitary individual.

*G.* D. *Wall*, for the defendants. The bill in this case is of extraordinary character. It is not to restrain the company, but to call in question the constitutionality of their charter. It does not allege that the defendants have exceeded their authority, or proceeded without the bounds of their charter: but insists, that they have no constitutional right to proceed at all. If the law is constitutional, the complainant has no ground to stand on; and if the object be to test the constitutionality of the charter, the complainant should have resorted to another tribunal. But he avoids the legal tribunal, in which it should properly be tried, and seeks to call it in question in this court. A court of equity is ancillary to a court of law, and does not take original jurisdiction of a question of this kind: 19 *Ves.* 449; 1 *Coop.* 305. There are cases in which a court of equity may try the constitutional question incidentally; but not one in which it is made the great preliminary question. This court has no power to try the constitutionality of the act, or question the power of the commissioners, *per directum:* 4 *Wash. R.* 608.

To entitle him to an injunction, the complainant should not only present a proper case, but be prompt in his application. He has lain by, and is now too late. The company made the survey and map, gave notice and applied for the appointment of commissioners. They went upon the ground, made the assessment, and the amount was tendered him. He did not appear before the chief justice, or make any objection to the appointment of the commissioners. He made no objection to their going upon the ground, but accompanied them there, and explained to them the nature and extent of the injury he would sustain. He might have brought up the question by *Certiorari*, trespass, or ejectment, but he made no application to the court for aid in any way. He has remained a passive spectator of the operations of the company, until they have expended a large sum of money,

and advanced with their works too far to recede; and now comes into court for an injunction to arrest their farther progress. We insist he is too late.

The bill is founded upon the principle, that irreparable injury was about to be sustained. The object to be protected is the farm; the injury to be sustained is the destruction of the river bank, and trees growing on it, which form a protection against freshets and ice; and the destruction of a fishery. The facts are controverted, or denied, by the answer, which is competent: 4 *Wash. R.* 605, *Haight* v. *The Morris Aqueduct Co.* But we have affidavits, which disclose the facts. The complainant loses about one acre of land, of little value. It is a bed of gravel, on the shore, below the present bank of the river, incapable of being used for agricultural purposes. It is unenclosed, and separated from the farm by a public road on the top of the bank, which passes between that and the other lands of the complainant. On the bank stand a few forest trees, of no use for ornament or shade; but which, it is said, form a protection to the bank. This bank will be shaved down, and another formed, between the raceway and the river, which will afford a protection; and the one bank will be substituted for the other. But the complainant says he has a right of fishery. He owns the land fronting on the river only part of the way. They set out on his land, and draw in on the land of another person. He really owns no fishery: it has not been entered according to law. The court cannot protect a fishery that has no legal existence. If it had, the land line can be carried as well on the bank of the raceway as on the river bank; and the fishery will not be injured. There is no injury to be apprehended from the encroachments of the river. The bank to be erected will be a better protection to the farm than the river bank. The only cause of complaint is, that a few trees may be cut down, which are now liable to be cut by the overseer of the highway.

This is not a case of irreparable injury. The complainant must show that the injury is irreparable, and that no adequate relief can be had at law, to give this court jurisdiction: *Opin.* of this court in the case of *The Columbia Water Co.*; 7 *John. C. R.* 307. Here the injury, if any, is trifling, and may be

compensated in damages: there is no ground for injunction. Beside, the complainant sets up his title to the land: the defendants say they have acquired title, by proceedings under the act. The title is in dispute. This court will not interfere in such a case, and go beyond the precedents and principles of the court; but will leave the parties to their legal rights.

As to the constitutional objection, that the taking of this property is for private purposes, and not for public use; that it does not appertain to that *eminent domain* which is the right of sovereignty: we say, that under our constitution that right is vested in the people, or their representatives in the legislature. What is the limit to that power, it is not easy to say, when it is not ascertained by the social compact. To the legislature also belongs the power of determining when it is proper to exercise this right; or what is a public use, for which private property may be taken. The one is incident to the other; and when the legislature have decided, their judgment ought not lightly to be called in question.

The company are authorized to create a water-power, for manufacturing purposes. The great object of the law, is to advance the cause of manufactures. And have not the legislature a right to do this? In what other way can they turn to public account and benefit the waters of the state, and privileges appertaining to them, but by acts of incorporation? Manufactures increase agriculture and commerce; and are not these public concerns? Highways are under the power of the legislature on the same principle. It is for the wisdom of the people, in their aggregate capacity, to judge of the public necessity, from the object and expediency of the measure; and the opinion of the legislature must govern: *Opin. Ch. Walworth, Beekman* v. *Saratoga and Schenectady Railroad Co.*, cites 2 *Kent's C.* 256. See also 2 *Peters' R.* 251.

Again, the raceway will be a navigable canal. The water is taken from the Delaware, and carried round the principal obstructions to the navigation of the river; Scudder's, White's, and the Trenton falls. It is not necessary that it should be declared to be a public highway in the act; it must necessarily be so. The water is taken from the river into the canal, and passes out;

it is public property, and is impressed with the right of servitude to the public: *Harg. L. Tracts*, 9; *Hale's de Jure Maris.*

The charter does not conflict with the constitution of the United States: compensation is to be made, but this need not be assessed by a jury. The legislature may adopt any other mode. The assessment by a jury, on an *ad quod damnum*, was the general mode in England, but not universal: 1 *Jacob's L. Dict.* 49. There are many cases under the enclosure acts, in which that mode was not resorted to. Other modes were adopted in this state, under the proprietary government: *Leam. and Spi.* 440; also under the royal government: *Allison's N. J. L.* 273, *sec.* 3, provides for the assessment of damages, for making roads, by commissioners. It is true, the first turnpike acts provided for the assessment of damages by jury; but that was unnecessary. Damages may as well be assessed by commissioners: it is done in other states, where the common law is adopted.

This does not interfere with the trial by jury. The true construction of the constitution of New-Jersey, is, that the trial by jury is to remain in criminal cases, and the trial of issues in fact between party and party: *Opin. of Baldwin, J., Buonaparte* v. *The Camden and Amboy Railroad Co.* This construction is reasonable; it satisfies the words of the constitution, and is conformable to the practice heretofore existing in this state. We insist that there is nothing in these constitutional objections.

*S. L. Southard*, on the same side. After the argument that has been made in this case, little remains to be said. My object will be, to satisfy the court, that this case is within the principles laid down by chancellor Walworth and judge Baldwin, the opinions cited; and to show, that the facts in this case present no equitable ground to give this court jurisdiction.

Who are the parties, and what are their rights? The complainant owns a farm on the Delaware: his right of soil runs under the water, and he claims a fishery. The defendants are a corporation, intended to effect a great public object; calculated to promote the agriculture and commerce of the country, and to

operate upon the navigation of the river. It is not extravagant to say, that it is calculated to have a larger effect upon the manufacturing interests of the country, than any other institution in this or any other of the states. There is not another location which, from the natural advantages of its situation, between the two great emporiums, and the extent of its water-power, is calculated to produce such effects. It is subject, by the terms of the charter, to be taken for the benefit of the state, and subject to a right of subscription on the part of the state. It seems to be insisted, however, that because the legislature did not declare it was intended for a public benefit, it is not so. This does not follow. If there be a plain object of public utility, then it is necessary, and beneficial to the state. Every provision of the act shows that the legislature had the public good in view. I infer, from the general character of the act, its provisions, and the effects to be produced, that this is an act for the public benefit. It is within the principle laid down by chancellor Walworth.

The whole object of the bill, is to show, that the law is unconstitutional, and on that ground to arrest the proceedings of the company. The complainant ought to have commenced his opposition when his land was first touched. He then made no opposition. The survey was made, the surveyors made report, it was made public, and yet no complaint was made. They applied to know if he would give or sell the land. He did not then say the law was unconstitutional, but said he must have one thousand dollars; and this for about one acre of land, on the bank of the river. Commissioners were applied for: he made no opposition at that time. When they went upon the ground, he appeared before them. He prepared a paper, and stated in writing to the commissioners, the grounds of his damages, and the amount he ought to have awarded to him. Did he not, in equity, assent to the proceeding? 5 *Wend. R.* 581–5; 4 *Halst. R.* 21, 22.

He laid by when he ought not: the consequence is important to the defendants. Unless the raceway goes on his land, it can go nowhere. He stands by, and sees the company making contracts to the amount of thirty thousand dollars, and expending the money; and after the work has progressed to a great extent,

he comes to a court of equity for aid. I think I should not be out of the way in saying, that the conduct of the complainant has admitted the constitutionality of the law; and that he cannot be permitted now to come into court and deny it. These circumstances should prevent the court from listening to the application.

The company are acting under an act of the legislature: there is no charge that they have gone out of the act. The granting of injunctions is discretionary; and the court will not interfere in such a case. The complainant claims title to the land; the defendants claim a right to take it, under the statute. It is a question of title, purely a legal question, which belongs to courts of common law jurisdiction. The complainant has ample remedy at law, and ought not to come into a court of equity. The injury is not irreparable. The term, irreparable mischief, is well understood in equity. This is not of that character. If the bank is injured, that can be repaired; and the injury, if any, to the fishery, compensated in damages. But we insist that neither will be injured. The bank of the raceway will serve for the fishery, and protect bank of the river. The very existence of the company depends on their maintaining the bank of the raceway. But has the complainant a fishery? It consists of going into the water on his land, and coming out upon the land of another. It has not been entered according to law. He has no fishery. There must be a distinct substantive property, to which the party has lawful right, to entitle it to protection.

But it is said the law is unconstitutional, on two grounds:— 1. That it takes private property, for private purposes; and, 2. That it tries questions of fact, without jury. As to this, I say, 1. That the constitutionality of a law is not for equity, but for common law cognizance: 2. That the unconstitutionality of a law, of itself, has never been the ground of an injunction.

I do not mean to say, that the court cannot decide the law to be unconstitutional; but that the party cannot come into court on that ground alone. He must show such a case, as, without the law, would be a proper case for injunction: then, if the defendants set up the law, it may be decided unconstitutional. But let us look at these questions, first, as to the ground, that the property of one man cannot be taken and given to another. I

do not mean to say that this is not correct. This was the case in *Vanhorne's lessee* v. *Dorrance*, in 2 *Dal.* —. There the land of some individual was to be taken and given to others: the public interest was not to be benefited. But the learned judge who decided that case, never said that such was the rule where public interests were concerned.

The rule laid down by judge Story, is, that all but political corporations are private: 4 *Wheat.* 668. Some private corporations must, then, be of a public nature; otherwise it might be said, that private property could not be taken for a private corporation: but this is not so. Private property may be taken for a private corporation, when the object is for public use. When a corporation is calculated, or intended, to produce public benefit, then it is public in its nature, and for public use. This is the principle on which chancellor Walworth puts himself. And who is to judge what is such a public use, as will justify the taking of private property? Who represents the sovereign power of the state, in whom this right of eminent domain resides? The legislature are to judge; and when they have adjudged, this court, nor no other, has the power to control it.

I admit that just compensation must be made, but *quo modo*. It is left open by the constitution. The legislature, not the court, are to point out the mode. There is no restriction. We are told that the legislature cannot point out the mode; there must be a trial by jury. The right of trial by jury is secured by the constitution, and I do not mean to advocate any infringement of it; but deny that it extends to this case. The constitution says, the right of trial by jury shall be confirmed, for ever. How did it exist when the constitution was adopted? It was in use only in criminal matters, and where parties disputed about facts. I deny that it existed as a mode of assessing damages, where there was no dispute about facts. In certain proceedings in the orphan's court, and in this court, in cases that did not exist previous to the adoption of the constitution, there is no trial by jury. But we are told, that the common law of England, at the time, required an assessment by jury, on a writ of *ad quod damnum*. But there were various cases in which this mode was not resorted to in England. It is amusing to trace the history of the writ of

ad quod damnum in this country. Some states use it altogether; some have never heard of it: 2 *Virginia Rev. L.* 225, 233, 238. Had this writ been adopted and in use in this state at the time the constitution was formed? I know of no allusion to it, but in the charter of the society at Paterson, and one other case. *Smith's History of New Jersey*, 129, informs us, that the first legislature held in New-Jersey, authorized private property to be taken for roads, by paying damages, to be assessed by commissioners. Will it be said that this relates to public highways? So do the cases in England. That shows that the rule was not universal, and hence the discretion of the legislature. These facts support the opinion of judge Baldwin, in the case referred to; to which I recall the attention of the court.

But I think there is a provision of the act incorporating this company, which has a bearing on this question. By the fifteenth section, the right of a trial by jury for damages, is reserved to the landholders. The damages must be assessed by appraisers, to enable the company to go upon the ground; but the right of trial by jury is not taken away; the remedy is left open to all who will not accept the sum awarded them. How, then, is the constitution violated? and what ground has the complainant to come here for injunction? I insist that he has no ground to claim it at the hands of the court.

*I. H. Williamson*, in reply. The complainant owns a valuable farm on the river: the defendants seek to take a part of it for their raceway. In constructing that, they will destroy the bank, which forms a natural protection to the farm against the river, and destroy a fishery. This is not a mere case of trespass, that may be compensated in damages, but a clear case of waste. Every serious injury to the inheritance, in waste: 2 *Blac. C.* 280. It is no answer to say, that the property is of little value, or the damage trifling. It is the peculiar nature and situation of the property, that entitles it to protection. The bank of the river, here, is a green bank, covered by a grove of trees in front of the house, and extending part of the way down the declivity. They support the bank, which protects the farm against the encroachments of the river. It is said they are forest trees: but forest

trees will be protected in equity, if useful only for shade or ornament. That they are necessary to preserve the bank, I refer to the affidavits. Let them be cut down and the bank destroyed and the injury is irreparable. The case in 7 *John. R.* was a mere trespass, in a quarry of stone of no special value that could not be compensated in damages.

It is said the waste is denied by the answer: that is under the common seal, and not under oath; it is insufficient. The answer denying the equity of a blll, must be as positive as the bill itself. The opinion of judge Washington, which has been cited, is entitled to great respect, but cannot be supported. The contrary has been decided, in New-York and in this state.

The fishery is valuable: it has been used as a fishery for the last ten years. It is of no importance that it has not been entered: it exists, and may be entered at any time. And if we own but a part, we are entitled to protection in that part. We are told we have remedy at law for the injury we may sustain, by trespass, ejectment, or *Certiorari*. The remedy at law is inadequate. We seek to prevent the injury: we could not go to law for that. The courts have concurrent jurisdiction in some cases, but this court alone has the power of prevention. If we had went to law, the company would have gone on to destroy our property, and we must have come here for a preventive remedy.

But, is said, our application is too late; that we have acquiesced in the proceedings of the company. Not so: the complainant, when applied to, stated the amount he demanded; and always expressed his determination to contest their proceedings, unless they made him full compensation; and the moment they cut down the first tree, he filed his bill. He could not, with safety, have filed it before: 1 *Swanst. R.* 243, 250.

I now approach a question of deep interest, the constitutionality of the charter. We object to this exercise of legislative authority, because it gives power to divest a freehold, and give it to a private company, for private purposes. All corporations, except political or municipal, are private corporations; although the objects of some are for public use. In this class come all corporations for the erection of turnpikes, railroads, and canals. They are highways. Every one has a right to use them, and if prevented may

bring his action: hence they are for public use. But this act was passed on individual application. It is a private corporation. They are authorized to create a water power, and may let or sell water privileges to individuals, to be employed by them for their own benefit. The property taken, will be private property still, and for private use. It is not for state necessity, or public use; for which purpose only can private property be taken. Hence the defendants' counsel are driven to the argument, that this is a project of great public utility, calculated to promote manufactures, increase agriculture, extend commerce, and benefit the community; and that this is such a public use as will justify the taking of private property. But will the public have a right to use this water power? Not unless they purchase it of the company. That there is a resulting benefit to the community, avails nothing. This is the case with most private corporations; they are calculated, in some respect, to benefit the community. The bank of the United States, although the government was a stockholder, was a private corporation, and for private use; but supposed to be beneficial to the community, and useful, if not necessary, to the government. All banks are considered beneficial to the community; they promote agriculture, manufactures and commerce. What would this water power avail the public, without the aid of bank facilities? Yet private property cannot be taken to erect a banking house. So every church, college, hospital, or even a block of houses, erected in a populous neighborhood, is a benefit to the community. But this is not the *public use* contemplated in the constitution. Private property could not be taken for such purposes.

It is said, this raceway will be a navigable canal, for public use; but the public will have no right to use it, unless they purchase the right of the company. Nor can it be used to assist the navigation. They must come out where they go in; there is no provision for a lock to let them out at any other point; no authority to take tolls; no regulation for passing boats or right to pass, secured to the public. The manifest object is, not to make a navigable canal, but create a water power, for manufacturing purposes, and for private use. There must be a *public necessity*, a *state necessity;* and it must be for a *public use*,

in which all the community may, of right, participate, to authorize the taking of private property.

This is the first attempt, in this state, to take private property for private use. It is a precedent of dangerous tendency, and ought to be resisted. If a company of individuals, or a corporation, want property for such a purpose, let them purchase it. Look at the charter of the society at Paterson. When that act passed, manufactures were in their infancy. It was a great object to introduce them. The general government took great pains to promote it: the state took a deep interest in it. That company had power to establish manufactures, and build navigable canals, designed for the transportation of goods and passengers. They are authorized to take private property for the use of their canals, because they were designed for public use; but not to create their water power, or for the use of their manufactories; which, though beneficial to the public, were for the private use of the corporation. That act was drawn by Alexander Hamilton. It was one of the first charters granted in this state after the adoption of the constitution, and may be regarded, in some measure, as a cotemporaneous exposition of that instrument.

The British parliament possess no power to take private property for private use. I refer to the celebrated case of the *Isle of Man*, noticed by the court in 2 *Dal. R.* 314; and is property not as safe here as in Great Britain, under a limited monarchy, with no written constitution to restrain the power of parliament?

What is a constitution? It is the supreme law of the land, paramount to the power of the legislature. It limits the exercise of legislative authority, and prescribes the orbit in which it must move: 2 *Dal. R.* 308. The legislature are the agents of the people; their power is delegated; they possess none but what is given them by the constitution, expressly, or by necessary implication. What is not given, is reserved to the people. Story, J., (speaking in reference to Rhode Island, where they have no written constitution,) says, It may well be doubted, whether the nature of society and of government, does not present some limits to legislative authority: 6 *Cranch's R.* 135; 2 *Peters' R.* 657. This position is correct. The right of acquiring and possessing property, is one of the natural, inherent and inalienable rights

of man: 2 *Dal. R.* 310; 2 *Blac. C.* 8, *n.* 1; 4 *Blac. C.* 9, *n.* 4. Its protection is one of the great objects of civil government: 1 *Blac. C.* 138–9.

I rely upon the distinction, that although private property may be taken, when it is necessary for public use; it cannot be taken for private use, although it may ultimately benefit the public. The only case to the contrary, is the opinion of chancellor Walworth. He goes so far as to put private property under the power of the legislature, in the case of state expediency. He cites 2 *Kent's C.* 274–5. This authority does not support his position. It cannot be law; or we live under a despotism, and hold our property at the will of the legislature. To this I oppose the opinions of Paterson, Marshall, and Cranch. I repeat it, there must be a *state necessity;* it must be taken for a *state use.*

Although the legislature must decide, in the first instance, they are not the exclusive judges of the necessity, or use, for which private property may be taken: it belongs also to the judiciary; and this court has the same right as a court of law, to decide upon the constitutionality of an act of the legislature. If this court has jurisdiction of a cause, on equitable grounds, it tries all matters connected with it. It is not bound to try a question of law, and may send it to a court of law to be tried; but it has the power to decide it without.

But if the legislature had power to authorize the taking of private property, in this case, we object to the mode. The constitution says, "Private property may be taken for public use, making just compensation." How is that compensation to be ascertained? By known and established principles, according to the law of the land: 1 *Blac. C.* 138. By this is meant, the right of applying to a court, and having a trial by jury. In *Vanhorne's lessee* v. *Dorrance,* Paterson, J., says, There are only three ways in which the amount of compensation for land taken by the state, can be ascertained: by agreement—by commissioners mutually chosen—or by a jury. He says, a jury is a necessary check on legislative authority. His argument is conclusive. But this act authorizes it to be done, not according to any known rules of law, but in a summary and arbitrary manner. Commissioners, appointed without the consent of the party, proceed,

without the examination of witnesses, without jury, verdict, or judgment: they make report, not to any court, but to the secretary of state; and from this there is no appeal. Such a tribunal is incompatible with the principles of our free institutions. Private property is sacred: the constitution was intended to make it more so. That guarantees the common law right of trial by jury. If the legislature cannot abolish the trial by jury, which is not pretended, can they dispense with it in any case? The chancellor of New-York seems to think it may be done. Of what avail then is our constitution. We insist, that no man can be divested of his freehold without his consent, or the intervention of a jury. Judge Baldwin says, that to require a jury, there must be a disputed fact in issue. That cannot be the test; for when a defendant, in an action sounding in damages, suffers judgment by default; whereby the facts are admitted, and no question remains but the quantum of damages, there must be a jury. This is the case in every instance where the writ of *ad quod damnum* is used. Nothing remains to be ascertained but the quantum of damages. But, it is said, that in this state, there are precedents for taking private property without a jury, before the revolution. The cases referred to are inapplicable, and do not support the position. The ordinance mentioned in *Smith's History of New-Jersey*, was under the government of the proprietors, who owned the soil and held the sovereign power, under no restriction but what they themselves imposed. The act contained in *Allison*, appointed commissioners to make a survey and estimate, and report the practicability and probable expense, of making a road. But in neither case was power given to take land; and both were before the constitution was fully established as part of the law of this state, and the right of trial by jury became the unquestionable right of every citizen of New-Jersey. The framers of the constitution did not adopt the laws, usages or innovations of the proprietors: they adopted the common law of England, and with it the trial by jury; and from the manner in which they allude to it, and their manifest solicitude to render it perpetual, it is to be inferred that they meant to adopt it in its full extent, and for every purpose to which it was applied in England.

I therefore conclude, that in New-Jersey private property can

only be taken for state necessity or state use; not for private use under the idea that the state may be benefitted; and that it cannot be taken for any purpose, without the intervention of a jury.

THE CHANCELLOR. It is always important for a court to ascertain, before it passes upon a cause submitted to it, that its nature and character are such as to be within the power and jurisdiction of the court; and especially when the jurisdiction is questioned or denied by the party upon whom the decision is to operate. It is peculiarly important for a court of equity, whose powers are extraordinary and peculiar, and which administers relief in a mode unknown to the common law.

My first business will be, to inquire whether the court can take jurisdiction of the cause now before it.

The power of a court of equity to interpose by injunction in cases of waste, private nuisance, and great and irreparable injury to the inheritance, is as well established as any that the court now exercises. It does not rest on modern or questionable decisions, but is ancient, uniform, and not now to be shaken. The late cases have so construed this power as to embrace trespasses of a continuous or extraordinary character: *Eden on Inj.* 139; *Stevens* v. *Beekman*, 1 *John. C. R.* 318: and they have gone upon the ground that the property to be protected was of peculiar value, for the injury or destruction of which a recompense in damages could not be made.

Upon the showing of the complainant, this is a clear case of waste. The complainant is in possession of a farm on the river Delaware. The house, which he has recently erected, stands upon the bank, not far from the commencement of the declivity. The bank along which the water sweeps when the river is full, is now a green bank, the upper part of which, through the whole extent of the farm, is covered with a grove of trees. The lower part, from the water's edge to the height of ordinary freshets, and to the roots of the trees, has been secured at great expense, by covering it with stones, by means of which, in connection with the trees, the bank is at present effectually secured. In constructing the raceway, as at present located, this green bank, a part of which is immediately in front

of the dwelling-house, must be cut down, and the trees destroyed, which will greatly expose the property to the encroachments of the river.

The answer, it is true, denies that the route of the raceway runs through the property in such a way as to occasion great, serious and lasting injury to the interests of the complainant in his said farm. It alleges, that the ground to be occupied will not exceed one acre, no part of which is enclosed or has ever been used for the purpose of cultivation, and that it will not be necessary to remove any trees or timber there standing, except a few forest trees, and those of little value.

I do not deem it necessary to inquire how far the court is bound to respect this answer, put in by the company under their corporate seal, or to sit in judgment on the opinion of judge Washington on this subject, in the case of *Haight* and the *Morris Aqueduct Co.* 4 *Wash. C. C.* 601, the legality of which was denied at the bar; for admitting the answer to be true, the case made by the bill, answer, and affidavits, is sufficient, in my view, to make out the apprehended case of waste. The facts admitted by the defendants, that a part of the bank must be taken down, and a part of the trees removed, are of more weight than the conclusions which they undertake to draw from them, that the injury resulting will be neither serious nor lasting. It is clearly shown that the bank as it now is, with the trees upon it, form a very valuable protection to the property. The importance of the trees is demonstrated by a fact stated by one of the witnesses—that within his recollection, the trees upon the bank of the river about a mile below the complainant's, were cut down, and although great labor had been expended and great expense incurred in securing the bank, yet that the river has very rapidly encroached upon it. He further states, that the spot spoken of is, as he thinks, less likely to be injured by the river than the farm of complainant; the channel of the river near the former place being free from islands and all other obstructions to its natural course. If the apprehended or threatened act of the company will be a lasting injury to the inheritance of the complainant, (of which there is no room, as I think, to doubt,) it forms a case of waste, over all which cases the court has an un-

doubted jurisdiction, and will exercise its preventive power on all proper occasions.

But if this should be considered in the light of a trespass, I should feel no difficulty in entertaining jurisdiction. It is not an ordinary case, where the damage is temporary, or of such a character as to admit of full compensation in damages. The defendants intend not merely to enter and carry away the product of the soil, or even a part of the soil itself, which the complainant might afterwards replace; they seek to appropriate the land to their own use, permanently and absolutely; to take entire possession of this part of his property, and place it beyond his power or control, as though he had never owned or possessed it This would be a complete severance of that part of the estate from the residue, and a destruction of it in the character in which the complainant now enjoys it; and it would be strange if this court had not authority to interpose its arm for the prevention of such an act. In *Jerome* v. *Ross*, 7 *John. C. R.* 331, the court refused to interfere in a case where the trespass charged was for entering upon the land of the plaintiff, and digging and taking away large parcels of stone from a ledge of rock on the premises. It was not charged, nor did it appear, that the ledge of rock was of any particular use or value to the plaintiff, or that it was desirable for building, fencing, or any other purpose either for use or ornament; and the court was of opinion that the plaintiff's remedy was in a court of law for damages. The distinction between that case and the present one is very strongly marked; and taking it on the ground upon which it was placed by the chancellor, it is an authority in favor of the complainant. From the reasoning of the court, and the cases cited, there is no doubt, that if the trespass complained of had been destructive of the estate, he would have injoined the defendant; and this doctrine is supported by a great variety of cases, in England and this country. See 7 *Ves.* 305, *Hanson* v. *Gardiner;* 1 *Bro. C. C.* 588, *Robinson* v. *Ld. Byron;* 3 *P. Wms.* 255, *Gibbs* v. *Cole;* 15 *Ves.* 138, *Crockford* v. *Alexander;* 2 *Dow P. C.* 520; 1 *John. C. R.* 318, *Stevens* v. *Beekman;* 2 *John. C. R.* 463, *Belknap* v. *Belknap;* 9 *Wheat.* 840, *Osborne* v. *Bank of the U. S.*

Without pursuing this subject further, I shall consider that the court has full and complete jurisdiction in this case.

It is insisted, however, by the defendants in this cause, that if the court has jurisdiction, it ought not to be exercised at this time in favor of the complainant. It is said he has lain by and slept on his rights; has seen the defendants making contracts for, and expending large sums of money in, the preparation of their work, and taken no step to prevent or restrain them, until the present bill was filed. If this objection be well founded, it is fatal to the application. It is a law of the court, and a dictate of sound reason, that when a party desires extraordinary aid, he must be prompt in his application.

The facts in this case show that the complainant did not consent to give his land for the purposes of the company, and that no agreement was made with him fixing the amount of compensation he was to receive. Upon this is founded the application to the chief justice for the appointment of commissioners to make an appraisement of the value of the land, and the damages the complainant was entitled to receive. After the valuation was made, and when the amount of it was tendered, he refused to accept it as a just compensation; and gave notice, that unless the company paid to him what he was willing to receive for the property, he would contest the validity of their proceedings. His courtesy to the commissioners, in permitting them to walk on and view the ground, cannot deprive him of his rights; nor does the fact, that he went with them over the ground and explained to them the nature and extent of the injury he was about to sustain, vary the case materially. He did not appear before the commissioners when they met to make up their report, either in person or by attorney. He fixed his price for his property. If the commissioners had thought proper to award him that amount, or if the company had thought proper to pay it to him, he would have waived all objections to their power, and to the mode of proceeding. He had a perfect right to do so. The company could not have been deceived, for they knew the determination he had made. They might have hoped, and probably did hope, that the complainant would be induced to alter his mind, and accept the sum awarded. However this may be, if they went

on under such circumstances they proceeded at their peril. It will not avail them to say, that the complainant saw them commencing operations, and expending large sums of money, knowing that the raceway must necessarily be constructed through his land, and yet that he took no means to prevent it; that he sued out no *Certiorari*, and filed no bill; and that, having neglected to take any legal measure, he is now too late, and must lose the privilege of the preventive remedy of the court. I do not perceive in this any laches deserving so severe a visitation. The complainant, it is true, might have filed his bill at an earlier day, placing himself upon the ground, that, as the survey was filed and could not be departed from, the danger was impending and the injury might be committed at any moment. The risk of sustaining the bill at that time would have been upon him, and he might have taken it if he had chosen to do so. But it must be remembered that the company had it in their power to bring this difficulty to an issue before they had expended any thing more than was necessary to make their surveys. They could have gone upon the property, as they afterwards did, and commenced operations. If the complainant had then remained silent, and acquiesced in the act; if he had seen them cut down the trees and make half the excavation, and had then applied for an injunction to prevent its completion; or if he had permitted the raceway to be completed, and then sought to enjoin them from letting in the water, he would have been too late. This court would have turned him over to his legal remedy for redress. But under the circumstances, was it at all necessary that the complainant should do more than he did? He had refused to accept of the sum awarded, and made known his determination to stand upon his rights, unless the company paid to him the amount that he deemed a proper compensation. It was not necessary for him to do more, until his rights were invaded. Justice to the company did not require it; and if from his not acting sooner, the company drew the conclusion that he did not intend to act at all; might not he, from the fact that the company was constantly expending large sums of money with full knowledge that this difficulty remained open, with much more propriety have drawn

the conclusion, that they intended to pay him his price for his property?

It is not unlikely that there have been misapprehensions on both sides, and that both parties have entertained the hope that the difference would be in some way adjusted and litigation prevented, and that in this they have both been disappointed. It is not perceived, however, that their legal rights are in any wise varied by it; and under the clear impression that the application of the complainant is not too late, I shall now proceed to consider the remaining and more important questions in this cause.

It appears from the case made, that the proceedings of the defendants are sought to be justified under the act of incorporation already mentioned, giving them authority to create a water power. This act, as we have seen, provides the mode to be pursued by the company in surveying, appropriating and acquiring title to such lands and property as may be necessary for the purposes of their grant. It requires a survey; an agreement between the parties, or, in case of disagreement, an assessment by three indifferent men; and a payment or tender of the amount appraised.

There is no complaint in this case that the company have exceeded the limits of the power given them, or that they have abused or misapplied it. In all such instances of abuse or misconduct, the court will interfere; but it will not give its aid where the powers granted have been exercised in good faith, or where they are discretionary, or where the right is doubtful: *Coop. Eq.* 77; 7 *John. C. R.* 340; *Jerome* v. *Ross;* 2 *Dow,* 251. The complaint is of a more serious character, deeply affecting the claims of the defendants, and the rights of the community. It is, that the act of incorporation, though emanating from the legislative authority of the state, confers no power to take the complainant's property in the way, and for the uses, in which it is designed or attempted to be taken; that it is unconstitutional, and therefore void.

Two grounds are taken:

One is, that the act assumes to vest the complainant's right and property in his lands, or a part of them, in the defendants, without a just compensation therefor, and without an opportunity

of having the compensation ascertained by a jury of the country.

Another is, that the land is sought to be taken, not to answer any state necessity, nor for the benefit of the community at large, nor for any public use whatever, but solely for the private gain and emolument of the said company.

The first ground presents the question, whether in cases of this kind, private property can be taken, without the intervention of a jury to ascertain the compensation which the party is to receive as an equivalent. The fifth amendment of the constitution of the United States declares, that private property shall not be taken for public use, without just compensation; but it is silent as to the mode of fixing the compensation, when there is no agreement. The twenty-second section of the constitution of our state, provides that the common and statute law of England, so far as they have been adopted, shall continue in force in this state till altered by the legislature, and that the inestimable right of trial by jury shall be and continue without repeal for ever.

In this branch of the argument, I assume the principle, that the property to be taken is for public use; that it may, under the constitution of the United States, be divested on making just compensation. The right of the state to take private property for public use, is conceded as a general proposition. It is a right appertaining to sovereignty; one which the state may freely exercise on all proper occasions, and which a jury has no power to control. It cannot be pretended, therefore, that before a state may exercise this high attribute of sovereign power, a jury must pass on the legality or propriety of the act. This would be to place the necessities of the state, in some instances, and its privileges, in others, in the keeping of a jury of the country, which would be contrary to the established order of all governments. The right, then, cannot be made the subject matter of trial by jury. But *compensation* is to be made, and that, too, a just compensation; and the question is, whether that just compensation can be ascertained in any other mode than by jury. No difficulty could arise on this subject, but for the constitutional provision. There is no reason why three indifferent men, selected by the chief justice from the body of the state, for their probity and indepen-

dence, should not, in a mere matter of valuation, exercise as just a judgment, and be in all things as discreet and impartial, as a jury of the vicinage.

Does a sound construction of the constitution require that these valuations should be made by jury?

We all revere the constitution, and profess to be regulated by its provisions. We believe it to be the supreme law of the land, and "paramount to the power of the legislature;" and that, whenever the legislature undertakes, in the exercise of its authority, to transcend the limits clearly prescribed to it by the constitution, its acts are void. It is, nevertheless, our duty to give it a rational and just interpretation; avoiding, on the one hand, a spirit of slavish fear, and on the other, a spirit of restless innovation. The constitution provides, that the common law of England, as well as so much of the statute law, as have heretofore been practised in this state, shall remain in force until altered, &c.; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this state, without repeal, for ever.

It is unnecessary to inquire into the origin of the trial by jury, or how far, and to what particular cases, it has been extended in England. How it was exercised in the colony, at the time of adopting the constitution, is a more important inquiry. It was a part of the common law, so far as that had been adopted or acted on here at that time; so far it was to remain the law of the state until altered; but that part of it relating to trial by jury was to remain without repeal. It was to remain, as it had theretofore been in use. Our means of information as to the practice in cases like the present, before and at the time the constitution was adopted, are limited. They are sufficient, however, to satisfy us, that the writ of *ad quod damnum* was not in use universally. In *Smith's History of New-Jersey*, we find that in 1681, under the proprietary government, certain commissioners for the settling and regulating of lands in this province, ordained, that in laying out, or *setting forth* as it is termed in the regulations, all public highways, the owners of lands, when such public highways shall be laid forth, shall be allowed reasonable satisfaction in lieu thereof, *at the discretion of the commission-*

*ers.* By looking a little further into this matter, it appears, that these commissioners for regulating lands, &c. were appointed by the first provincial assembly of West Jersey, assembled at Burlington in 1681: *Leaming and Spicer*, 440. And it is remarkable, that the assembly at the same session passed a solemn act, general and fundamental in its character, and in many respects corresponding with a bill of rights, in which they declare, "that no proprietor, freeholder, or inhabitant of the province, shall be deprived or condemned of life, limb, liberty, estate, property, or any ways hurt in his or their privileges, freedoms, or franchises, upon any account whatsoever, without a due *trial* and judgment, passed by *twelve good and lawful men of the neighborhood, first had, or according to the laws of England.*" Either the ordinance of the commissioners for regulating lands, acting under the authority of this very assembly, and some of whom were members of it, was irregular and unlawful, or the valuation thus to be made for private property taken for public use, was not considered a case in which a jury was indispensably necessary according to the laws of England. The latter branch of the proposition is by far the more probable, and if it be correct it proves satisfactorily that they did not apply the common law right of trial by jury to a case of that kind. In 1765, under the royal government, provision was made by law for the assessment of damages by commissioners, on the occasion of laying out *certain straight roads* in the province: *Allison*, 273. Before this time, there was a general road law, by which private property was taken and appropriated as it now is, without compensation, and which had reference only to the ordinary roads from one neighborhood or settlement to another. It was supposed by the legislature that it would greatly facilitate the conveyance of letters by the post, be of great importance to his majesty's service, and to the commercial interests and general convenience of the inhabitants of the province, to have some of the principal highways shortened. Commissioners to make the necessary surveys and estimates were appointed, with power to enter and pass any lands through which the straight lines might run. They were directed to make an estimate of the whole expense, and also of the damages it might occasion to any person

through whose lands it might pass, and a provision was made for paying the whole expense by lottery. It would appear from this, that the legislature thought these communications, when thus opened, would be more immediately important to the public at large, and especially to the government; and that in taking private property for these purposes, there was a propriety and moral fitness in making compensation to the owners. Commissioners, as we have seen, were appointed to make an assessment of the damages to be sustained by individuals. These cases are important to show what was the practice before the revolution; and if, in consequence of the payment of damages, the property of the soil became vested in the state, as I apprehend was the fact in the last case, it is directly in point. That the property was absolutely divested, and became the property of the state, is inferred from the fact that these particular roads, have been, in all our road laws save the last, excepted out of their general operation, and declared to be unalterable by surveyors of the highways, or any other persons. I do not find any cases about this time, in which the writ of *ad quod damnum* was resorted to, or an assessment by jury ordered; and, judging from what I have been able to find, I cannot come to the conclusion that in 1776, when the constitution was adopted, the trial by jury was extended to this kind of assessments, and that it was, therefore, the common law of the land. It may be useful to inquire, what has been the practice since. In 1791, the act was passed incorporating the society for useful manufactures at Paterson. This act was prepared with great care and particularity, and provides for an assessment by the writ of *ad quod damnum* and a jury. The most of the acts passed since that period, in which private property is authorized to be taken for public use, are acts authorizing the making of turnpike roads or canals; and they have almost uniformly, till of late, followed that precedent, so far as regards the taking of lands to be permanently occupied. There are some acts in which a different mode has been pursued. In 1802, the legislature authorized Nathaniel Budd to appropriate to his own use, for the purposes of a ferry at Paulus Hook, two acres of land which was in dispute between the heirs of Kennedy and the corporation of Bergen. The act provided, that if, after the contro-

versy was ended, the successful party and the said Budd could not agree as to the value of the land, or the sum to be paid by Budd, that then he should pay such sum annually by way of ground rent, as should be adjudged by three disinterested freeholders, appointed by one of the justices of the supreme court; or that Budd should be paid for his improvements an amount to be ascertained in the same way: 1 *Pamph. Laws*, 153. See also 2 *Pamph. Laws*, 747, as to the mode of making assessment in relation to the drowned lands in Sussex. In 1798, it was enacted, that all those who should receive damage by the erection of a bridge over the river Delaware at Trenton, should be compensated in damages, and the damages assessed by commissioners to be appointed by some of the justices of the supreme court.

So far as relates to the damages sustained by taking away gravel, stones, or other materials for constructing roads, canals and other improvements, most of the charters have left them to be ascertained by arbitrators or commissioners. And yet it is evident, that in many instances, the taking away of such materials, and appropriating them to the use of a company, is quite as injurious as appropriating the whole land. If it be gravel, the value of the property may be destroyed when that is gone. If it be a quarry, of what benefit will the property be when the stone is exhausted? The principle is the same, whether the entire possession of the land be taken, or whether the possession be assumed of one half of it. It is not easy to perceive why a different course of proceeding has been adopted in the two cases, if both were within the range of *constitutional* provision; and if one is, will it be said that both are not.

It is, nevertheless, certainly true, that since the year 1800, almost all the acts passed have provided for assessments by a jury where lands have been taken absolutely. This shows the strength of popular feeling in favor of that mode, rather than its exclusive constitutionality. It may be a strong argument with the legislature in favor of the policy of providing that mode, as most satisfactory, and most analagous to the genius of our institutions; but does not satisfy me that the mode adopted in the act under consideration is unconstitutional, and therefore void. The

evidence in favor of the practice, before the adoption of the constitution, is very strong; and I am, moreover, strongly inclined to the opinion, that the words of the constitution are fully satisfied by preserving the trial by jury in all criminal cases, and all trials of right in suits at common law.

I conclude, then, that the first objection against the constitutionality of the present act, is not sustained.

The second objection is, that the land is sought to be taken, not to answer any state necessity, nor for the benefit of the community at large, nor for any public use whatever, but solely for the private gain and emolument of the company.

This presents a grave and interesting subject for inquiry. It strikes at the constitutionality of the law, not merely in relation to its details, and minor provisions, but its very nature and objects; and if the blow be well aimed, it is utter destruction.

It is admitted, that private property shall not be taken for private use. The legislature has no right to take the property of one man and give it to another, even upon compensation being made. I have already adverted to the right of the state to take private property for public use, and need not repeat what has been said. This right was originally founded on *state necessity*. If its exercise had been confined to this limit, there could be no doubt as to this case; for it will not be pretended that the enjoyment of the complainant's property is called for by any necessity of the state, or that it is to be appropriated in that way. In process of time the right has been more liberally construed. The term *public use* has been substituted; and what shall be considered as public use, is, under the decisions of our courts, an unsettled question. It is not limited to the actual use and occupation of the property by the state; for private property is taken in many instances, when the state, in its sovereign capacity, does not and cannot occupy it. It is not limited to public political corporations; for the right of private corporations, to take private property for a variety of purposes, such as the construction of canals, turnpike roads, &c., is not disputed at this day. Nor is it limited to private corporations whose sole object, or even whose primary object it is, to promote the public good. Such corporations are not to be found. Private interest or emolument, is the

*primum mobile* in all. The public interest is secondary and consequential. Where, then, shall the line be drawn by this court, called on as it now is to decide on the point?

Before I undertake to express any opinion, it will be well to see that I am in the line of duty; for it is contended on the part of the defendants, that the power of judging on this subject is committed to the legislative department of the government alone, and that the judiciary cannot interfere. This doctrine the court can in no wise admit. The legislature, in this state, is not omnipotent, as was the British parliament. It is subordinate to the constitution; and if it transcend its power, its acts are void, and it is the duty of the judiciary to declare them so. The duty is at all times unpleasant, but no independent tribunal will hesitate to do it in clear cases. The opinion of chancellor Kent, in his Commentaries, (2 *Kent*, 276,) does not support the position of the learned counsel. The author remarks, that it undoubtedly must rest in the wisdom of the legislature to determine when public use requires the assumption of private property. I do not understand by this, that the legislature is to be sole judge of what is meant by public use; but that the fact being established, that private property of a particular character may be taken and appropriated to public purposes, it is for the wisdom of the legislature to say when that appropriation shall be made. That the commentator did not intend to be understood as saying, that the legislature was to be sole judge in this case, is evident; for he admits afterwards, that if the legislature should take the property of A. and give it to B., the law would be unconstitutional and void. And yet who is to judge that the property thus taken from one and given to another, was not intended by the legislature for public use or benefit? Who is to declare it unconstitutional and void, after they have determined its propriety?

Not doubting that the court may safely sit in judgment on this matter, it only remains to inquire, whether the use to which the property is to be appropriated, is a public use. It has been seen, that turnpike roads and canals are considered of a public nature, so far as to authorize the taking of private property for their construction. Railroads have lately been added to this class of public improvements. In the case of *Joseph Buonaparte* v. *The*

*Camden and Amboy Railroad and Transportation Company*, the circuit court refused to grant an injunction, applied for on the ground that the purpose to which the land was to be applied was a private and not a public purpose. The same course was taken by chancellor Walworth, in the case of *Beekman* v. *The Saratoga and Schenectady Railroad Company*. It is contended, however, that the present case is going a step further than has yet been done. Turnpike roads have been considered as public, or as appropriated to public uses, because every one has a right to travel them on paying the regular toll. Railroads have been considered public, because they facilitate the conveyance of passengers and the transportation of merchandize, and thereby benefit the community; whereas the object of the present franchise is to create a water power, and erect thereon extensive manufacturing establishments. These will be under the control of individuals. The company may either build or lease. They may build for themselves, or lease to whom they please. And they are under no obligation to let the public participate in the immediate profits of their undertaking. If to establish this as a public benefit, it be indispensably necessary that the public should have the privilege of participating in it directly and immediately, then the proposition is not made out, and the defendants have no authority. But is not this view too narrow? Can public improvements be limited within such a compass? May we not, in considering what shall be deemed a public use and benefit, look at the objects, the purposes, and the results of the undertaking? The water power about to be created, will be sufficient for the erection of seventy mills, and factories, and other works dependent on such power. It will be located at the seat of government, at the head of tide water, and in a flourishing and populous district of country. It will be no experiment in a country like ours; and, judging from the results in other places, we may make a sufficiently accurate calculation as to the result here. Take the town of Paterson as an example. The water power there is in the hands of individuals—a company like this. They are under no obligation to lease or sell any mills or privileges to the public; and yet see the result of a few years' operation. Paterson is now the manufacturing emporium

of the state, with a population of eight thousand souls. It has increased the value of property in all that district of country; opened a market for the produce of the soil, and given a stimulus to industry of every kind. May we not hope that a similar benefit may be experienced here? Compare this with some other improvements in the state, which, on the principles contended for, are called improvements for public purposes, and for the erection of which a large amount of private property has been taken. Take, for example, one of the oldest and longest turnpike roads in the state—the one from New-Brunswick to Easton. What public benefit has resulted from that road, compared with the result of the water power on the Passaic? And yet, the road is declared constitutional, because the community may use it by paying toll.

I incline to think the principle sought to be established by the defendants' counsel, is too limited; but I do not know that this court can establish a general rule that shall hold good in all cases, and be a permanent bar to legislative encroachment. The ever varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit, may depend somewhat on the situation and wants of the community for the time being. The great principle remains. There must be a public use or benefit; that is indisputable: but what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule.

Looking at this case in all its bearings, and believing as I do that great benefit will result to the community from the contemplated improvement, I am not satisfied to declare the act of incorporation, or that part of it which is now in question, void and unconstitutional. I do not see in it such a decided and palpable violation of constitutional right as will warrant me to put an end to this work, by the strong arm of the court. The legislature have thought proper, in their wisdom, to exercise the right of eminent domain, for an object which they deem of public use and importance; and although their judgment is not conclusive as to the right, it is certainly entitled to a most respectful consideration. They have authorized a company to do what the state itself

might have done without having their right questioned. They have in this pursued the ordinary mode. All great improvements in our state, are made through private incorporated companies, and perhaps better accomplished in that way than any other. The mere mode of making them, forms no objection in itself to their constitutionality: courts will look at the object, and judge from that.

In passing upon this question, I cannot forget that I am sitting in equity, where questions of strict law are not ordinarily tried; and that the court is called on to exercise a most high and delicate power, one never to be exercised except in clear and unequivocal cases. This does not present itself to me as such case; and although in the investigation of it, I have entertained serious doubts on the last point, yet I am clearly of opinion that the injunction ought not to issue.

The injunction is refused.

CITED *in Amer. Print Works* v. *Lawrence*, 1 *Zab.* 259: *Hardenburgh* v. *Far. & M. B'k of New Brunswick*, 2 *Gr. Ch.* 74; *Soc. for Estab. Usef. Manufac.* v. *Butler*, 1 *Beas.* 506; *D. & R. Can. & C. & A. R. & Tr. Co.* v. *R. & D. B. R. Co.*, 1 *C. E. Gr.* 378; *Coster* v. *Tide Water Co.*, 3 *C. E. Gr.* 64; *Carlisle* v. *Cooper*, 6 *C. E. Gr.* 579–584.

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1 The testator was accustomed, upon the marriage of his daughters, to advance to their husbands one hundred and fifty dollars each, and take from them an obligation for the payment of the same, without interest; with an understanding, that it was to be collected for the benefit of the children of his said daughters in case their husbands survived them; but if the wife survived the husband, payment was not to be required of his representatives, and the obligation was to be considered as cancelled:—This was strictly an advancement; a gift to be accounted for, as part of the share of the daughter, to preserve equality in the distribution of the testator's estate. *Wanmaker's Ex'rs* v. *Van Buskirk*, 685

2 This cannot be considered a debt, the money not being wanted to satisfy claims against the estate; but the daughter having survived her husband, and the testator having devised all his personal property amongst his children, equally; to preserve such equality, this advancement must be brought in by the executor as constituting part of the estate. *Ib.*

3. But though a bond taken for this advancement, and including a farther sum paid by the testator for his son-in-law, be secured by a mortgage on his real estate, which descended to his children; it is not necessary that the money should be collected on the mortgage, merely to be paid over to the widow: the executor may consider it as part of her share of her father's estate. *Semble*, That an advancement bears no interest. *Ib.*

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1. It is a well settled principle that this court has no power to compel a party to appoint an arbitrator; and, of course, that a specific performance of an agreement depending on such appointment, cannot be decreed. *Copper* v. *Wells*, 10

2. In cases where the specific performance of an agreement has become impossible, or from the nature of the contract cannot be decreed, the party aggrieved is entitled to compensation in damages for the non-performance of the agreement. *Ib.*

3. A person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of his ignorance of the legal conse-

quences flowing from those facts. *Hinchman* v. *Emans' Adm'r*, 100

4. In decreeing specific performance of agreements, the court is bound to see that it really does that complete justice which it aims at, and which is the ground of its jurisdiction. *King* v. *Morford*, 274

5. If the claim for a deed is not just and reasonable; if the party has been grossly negligent of his rights, or has abandoned his contract, equity will not afford him relief. *Ib.*

6. Delay, amounting to apparent negligence, may be explained; and under special circumstances, as where there is a difficulty about the title, it presents no bar to relief in this court. *Ib.*

7. Whether the specific performance of a contract shall be ordered by this court, is always a matter resting in sound discretion. *Ib.*

8. The strict rule is, that the party coming into equity for a specific performance, must come with perfect propriety of conduct, otherwise he will be left to his remedy at law. *Ib.*

9. A written contract for the sale of real estate may be waived by parol. *Ib.*

10. On a bill by the vendor, for specific performance of a contract for the sale of land at auction; where it appears that the vendee was induced to make the purchase by the fraudulent contrivance and management of the vendor, he can have no remedy to enforce the contract in a court of equity: but where the charge of fraud or collusion is not established against the complainant, the relief he seeks cannot be rightfully withheld on that ground. *Rodman* v. *Zilley*, 320

11. So the vendee being intoxicated at the time, and not in a situation to judge correctly, or act with prudence, will not avail him to avoid the contract, unless he can show that it was procured by the contrivance of the vendor, or that an unfair or improper advantage was taken of his situation. *Ib.*

12. Courts of equity seldom interfere to set aside contracts of sale, on the ground of inadequacy of price; they leave the parties to their legal remedies. But when called on to enforce a contract, they examine into the consideration to be given, its fairness and equality, and all the circumstances connected with it; and if any thing manifestly inequitable appear in that part of the transaction, they will never lend their power to carry the contract into execution. *Ib.*

13. There can be no objection to a contract made with a man in the habit of buying and selling, and transacting his own business, because he was illiterate, unless he has been grossly deceived or fraudulently imposed on. *Ib.*

14. The rule of the court is that *time* may be dispensed with, if not of the essence of the contract. In this case, the time of the delivery of the deed was not held to be of the essence of the contract. *Ib.*

15. A party may waive his technical right in this respect, and the waiver need not be direct, or in writing, but may be inferred from circumstances. *Ib.*

16. A prior incumbrance existing on the property, and known to the purchaser, is not a bar to a specific performance; but it may be referred to a master to inquire as to the amount of the incumbrance and state of the title, that the court may judge and take such order as may be expedient. *Ib.*

17. A waiver of a contract for the sale of real estate may be by parol, but it should be express, and of such a character as to leave no reasonable doubt as to the intentions of the parties. *Ib.*

18. Under conditions of a vendue "for the sale of the property of S. R." it is no objection to the execution of the contract, that a part instead of the whole of a lot of land was sold; provided it was made known what part was to be sold at the time it was set up. *Ib.*

*Vide* EXECUTORS AND ADMINISTRATORS, 10, 11.
EVIDENCE, 3, 9, 10, 11, 14, 15.
VENDOR AND PURCHASER, 9, 13, 14.

ALIMONY.

*Vide* DIVORCE.

AMENDMENT.

*Vide* PRACTICE, I.

ANSWER.

*Vide* PLEADING, III.

APPRAISEMENT.

*Vide* AWARD.

ARBITRATOR.

*Vide* JURISDICTION, 1.

ASSETS.

*Vide* DEBTOR AND CREDITOR, 3.
EXECUTORS AND ADMINISTRATORS, 9.

ASSIGNMENT AND ASSIGNEE.

*Vide* DEBTOR AND CREDITOR, 5.
MORTGAGE, II.

ATTACHMENT.

*Vide* SHERIFF, 4.

AWARD.

1. If the appraiser chosen by one party, without the concurrence of the other, made an appraisement, it is an ex parte proceeding, irregular and void. *Copper* v. *Wells*, 10

2. The sum assessed by the appraisers (as the value of lands and damages) can be no compensation for lands not described in the survey by which the appraisement was made. *Southard* v. *The Morris Canal*, 518

3. Whether upon notice given to the widow in possession, a sum of money assessed to her, without noticing the infant heirs, is intended for the damage to her dower right, or as full compensation for all the injury done to the property, *query*. *Ib*

B.

BANKS.

*Vide* CORPORATIONS, 18, 19.

BARON AND FEME.

*Vide* HUSBAND AND WIFE.

BILL.

*Vide* PLEADING, II.

BILL OF REVIVOR AND SUPPLEMENTAL BILL.

*Vide* PLEADING, II. 9.

BILL OF EXCHANGE.

1. A draft, payable out of a particular fund, at an indefinite period of time, and on a contingency, is not a bill of exchange, subject to the rules governing commercial paper; and a general acceptance does not alter, but follows the nature of the draft. On receiving such a draft, and giving a receipt for it, promising "to credit it when paid," the receiver cannot be obliged to credit it until paid, nor be held accountable for not using due diligence to collect it: the original debt remains until the money is paid. *Smith* v. *Wood*, 74

2. The holder of a promissory note is entitled to the benefit of a collateral security given by the principal debtor to his surety. *Skillman* v. *Teeple*, 232

*Vide* EVIDENCE, 1, 2.
MORTGAGE, 20-22.

BOND.

1. Where a sheriff, *colore officii*, takes a bond for the performance of matters not authorized by the statute, the bond is void. *Smith* v. *Allen*, 43

2. But if there be a mere verbal difference or departure from the provision of the statute, which imposes no new duty on the obligor, or no duties diverse from those required by the statute as justly and legally expounded, the bond will be good. *Ib.*

3. If, under the act of 1799, (*Rev. Laws*, 426,) which directs the courts of common pleas to mark and lay out the bounds and rules of the prisons in their several counties, and provides, "that every prisoner in any civil action, giving bond to the sheriff with sufficient securities *that he will keep within the said bounds*, shall have liberty to walk therein; and if he walk out of said bounds the bond shall be forfeited," the sheriff take a bond with condition "that the prisoner shall keep within the bounds of the prison limited and prescribed by the judges of the court of common pleas of the county of E—, *and not walk out or depart the same until he be discharged by due course of law*," it is within the rule, and a good bond. *Ib.*

4. Such a bond is not a bond of *indemnity*, strictly speaking. It does not lie in the mouth of the obligors to say the sheriff is not damnified. There is no necessity of showing an actual damnification. The bond is actually forfeited by the defendant going off the limits, and the cause of action is made out by proving the bond and the escape. *Ib.*

*Vide* JURISDICTION, 3, 11.

BRIDGES.

*Vide* CHOSEN FREEHOLDERS.

C

CAMDEN AND AMBOY RAILROAD COMPANY.

*Vide* CORPORATIONS.
SURVEY.

CANCELLATION.

*Vide* MORTGAGE, II.

CERTIORARI.

The principle is universal, that where the rights of an individual are invaded by the acts of persons clothed with authority, and who exercise that authority illegally, the persons aggrieved must seek redress by *certiorari*. *Tucker* v. *The Board of Chosen Freeholders of Burlington*, 282

CHOSEN FREEHOLDERS.

1. The act of 13th November, 1823, which provides "that it shall and may be lawful for the board of chosen freeholders in and for the county of Burlington, *at their discretion, to build and maintain a good and sufficient bridge* over Bass river," at a particular place, vested in the corporation the right to build the bridge at the place specified, whenever, in the judgment and sound discretion of the freeholders, the right might be advantageously exercised. *Tucker* v. *Chosen Freeholders of Burlington*, 287

2. The authority was not temporary, but a continuing power; it did not cease, although it was not exercised by the then existing board of freeholders, or although the board in 1826 might have decided that it was inexpedient to build the bridge. *Ib.*

3. This act clothed the board of freeholders with the same power to erect a bridge over the river at the place designated, that they have of common right, to build bridges over other streams in the county, not navigable. *Ib.*

4. *Semble.* That the board of freeholders have no authority to erect a bridge over a navigable stream, without an act of the legislature expressly for that purpose. The authority vested by such an act, is independent of the general law respecting bridges; and it is not necessary that the overseer of the highways should give notice to the director of the board of freeholders, of the necessity of a bridge at the place specified. *Ib.*

5. The board of freeholders having jurisdiction over the subject matter, this court cannot interfere upon the ground that their conduct has been arbitrary, or that the complainants have been denied a fair hearing. The right of supervision and correction is in the supreme court: it appertains to their general supervising jurisdiction. *Ib.*

6. The surveyors of the highways and chosen freeholders are vested with a general authority, by statute, to lay out and cause to be opened public highways; but this general power must be construed reasonably. "A navigable river is of common right a public highway; and a general authority to lay out a new highway, must not be so extended as to give a power to obstruct an open highway already in the use of the public." Hence it has always been considered necessary, when a bridge was required over a navigable stream, to procure a special act of the legislature: their right to grant such power is beyond dispute. *Attorney-General* v. *Stevens*, 369

COLLATERAL SECURITY.

*Vide* BILLS OF EXCHANGE, 2.
TRUST AND TRUSTEE, 1.

COMMON SEAL.

*Vide* CORPORATION, 14.
EVIDENCE, 19, 20.

CONCEALMENT.

*Vide* FRAUD, 11.

CONSOLIDATION OF SUITS.

*Vide* PRACTICE, III.

CONSTITUTION, CONSTRUCTION OF.

The constitution provides "that the common law of England, as well as so much of the statute law as have heretofore been practiced in this state, shall remain in force until altered by the legislature, &c., and that the inestimable right of trial by jury, shall remain confirmed as a part of the law of this state without repeal forever." These words of the constitution are fully satisfied, by preserving the trial by jury in all criminal cases, and all trials of right in suits at common law. *Scudder* v. *Trenton Delaware Falls Co.*, 69

CONTRACT.

*Vide* AGREEMENT.

CONVEYANCE.

*Vide* DEED.

CORPORATION

1. The court of chancery is not the proper tribunal for calling in question the rights of a corporation, as such, for the purpose of declaring its franchises forfeited and lost. *The Society for Establishing Useful Manufactures* v. *The Morris Canal and Banking Co.*, 157

2. The "Society for Establishing Useful Manufactures," owning the lands on both sides of the Passaic river at Paterson, the seat of the manufactories, where the tide does not ebb and flow and the stream is not navigable, as the riparian proprietors, are entitled to the use of the stream. They have it in a property, growing out of the ownership of the soil, as sacredly regarded by the law as the right of soil itself; and a right to enjoy it without diminution or alteration. *Ib.*

3. The right is not confined to the use of so much water as may be necessary for their present purposes. They have appropriated to themselves the use of the stream, and have a right to take out the whole of it for the purposes of their manufactories; provided it is, after being used, again restored to the bed of the river for the benefit of those below; and provided, also, that no one having prior rights is thereby injured. *Ib.*

4. The Morris Canal company, by using the bed of the Rockaway (a branch of the Passaic) as part of their canal, introducing into it the waters brought from lake Hopatcong and other sources, mingling them with the waters of the Rockaway; and on leaving it, taking out water to supply their canal, which is not again returned into the stream before it passes Paterson; do not injure the rights of the Society for Establishing Useful Manufactures at Paterson, provided they take out no more water than they bring in, and the flow of water at Paterson is not thereby diminished. *Ib.*

5. The rights of the Canal company are subject to the prior rights of the Society, and must be exercised in such manner as that the Society thereby sustains no injury. *Ib.*

6. *Semble.* That the legislature have not power, by a subsequent act, to authorize the taking by a corporation, of streams of water or other property, previously appropriated by charter to the use of another corporation, and essential to the object of the prior grant. *Ib.*

7. Where a corporation has been duly organized, and thereby acquired a legal existence, a court of equity will not, upon an alleged *nonuser* or *misuser* of its corporate privileges, declare the charter to be forfeited: such a power is of right to be exercised by a court of law and not a court of chancery. *Attorney-General* v. *Stevens*, 369

8. Where a set of men claiming to be a legally incorporated company under an act of the legislature, have done every thing necessary to constitute them a corporation, colorably at least, if not legally, and are exercising all the powers and functions of a corporation; they are a corporation, *de facto*, if not *de jure*; and this court will not interfere, in an incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers. *Ib.*

9 The commissioners appointed to receive subscriptions for the stock of an incorporation, are trustees; and as such this court, if a proper case was made, might control their acts: but, to authorize it, there should be some complaint on the part of the stockholders, or persons subscribing or seeking to subscribe for stock; and the proceeding should be by bill, and not by information. *Ib.*

10. There is not, in the charter of the Camden and Amboy Railroad and Transportation company, any specific grant of power for this particular bridge, (over South river.) But there is a special authority to erect bridges and all other works necessary for the completion of this particular road. The conclusion is, that the power to construct bridges over all the streams on the route, so as best to carry into effect the object of the incorporation, is given in the act, if not in express terms, yet by necessary implication; and the grant thus made is constitutional. *Ib.*

11. The power must, nevertheless, be exercised discreetly, and with a due regard to the privileges of others. If any injurious and wanton exercise of it be shown to this court, it will interfere and regulate it on proper principles. To warrant such interference, the exercise of the power must be shown to be, not only injurious, but wilfully or wantonly so: a mere mistake in judgment will not be sufficient. *Ib.*

12. The Morris Canal and Banking company, in erecting the dam to raise the waters in lake Hopatcong, have not exceeded their chartered powers, or used them unnecessarily; it being notorious, that without the waters of lake Hopatcong their canal would be worthless. *Southard* v. *Morris Canal*, 518

13. The powers of a corporation are, strictly speaking, two-fold; those that are derived from express grant, and those that are incident and necessarily appertain to it, whether expressed in the grant or not. *Leggett* v. *New Jersey Manufacturing and Banking Co.*, 541

14. The power to make by-laws, to make and use a common seal, and the right to sue, are incident to every corporation. *Ib.*

15. In modern times, it has been usual to embrace all these incidental powers

in the act of incorporation, so that it may now be considered a general rule, that the powers of a corporation are regulated and defined by the act which gives it existence. *Ib.*

16. A corporation is strictly limited to the exercise of the powers specifically conferred upon it; and the exercise of the corporate franchise cannot be extended beyond the letter and spirit of the act of incorporation. *Ib.*

17. Corporations, like natural persons, are bound only by the acts and contracts of their agents, done and made within the scope of their authority. *Ib.*

18. The president and cashier of a bank, as such, have no power to execute, in the name and behalf of the corporation, a mortgage or conveyance of real estate. *Ib.*

19. What are the appropriate duties and powers of the president and cashier of a bank. *Ib.*

20. Corporations in their contracts stand upon the same footing with natural persons, are open to the same implications and receive the benefit of the same presumptions. *Ib.*

*Vide* EVIDENCE, 19, 20.
JURISDICTION, 18, 27.
LEGISLATURE, 5.

COSTS.

*Vide* PRACTICE, II.

CREDITOR.

*Vide* DEBTOR AND CREDITOR.

CUSTOM.

*Vide* LANDLORD AND TENANT, 2.
EVIDENCE, 11.

D.

DAMAGES.

1. In cases where a specific performance of the agreement has become impossible, or from the nature of the contract cannot be decreed, the party aggrieved is entitled to compensation in damages for the non-performance of the agreement. *Copper* v. *Wells*, 10

2. There is a distinction between damages arising from the non-performance of a contract, which damages may be partly imaginary, and partly the result of actual or supposed loss or inconvenience; and the damages to which a party is justly entitled for repairs or beneficial and lasting improvements, under the faith of an engagement which is afterwards discovered to be defective, or impossible to be executed by default of the opposite party. In the first case, the damages can be properly assessed only by a jury upon an issue of *quantum damnificatus;* in the last, the compensation may be safely ascertained by an inquiry before a master or commissioner, or at the discretion of the court an issue may be awarded. *Ib.*

3. In cases of the latter description the jurisdiction of this court is complete: the party has a clear equity to be restored to the money paid for improvements, which are rendered valueless to him, but are greatly beneficial to the owner of the land. *Ib.*

DEBTOR AND CREDITOR.

1. Where the property of a debtor has been sold at sheriff's sale, and bought in by his friends for a nominal consideration, and upon a bill filed in this court the purchase has been decreed to be *in trust* for the benefit of creditors, and the property is ordered to be re-sold, the creditors having specific liens on the property at the time of the first sale, are to be paid first, according to their respective priorities. *The State Bank at Elizabeth* v. *Marsh*, 288

2. The judgment creditor under whose execution the first sale was made, is not to be excluded, or limited to the sum produced by that sale. If the proceeds of the second sale will reach that judgment, in its order, the balance should be paid; or if the purchasers at the first sale have since

paid off the judgment, they are entitled to be reimbursed. *Ib.*

3. It makes no difference, that the property is under the direction of this court, as equitable assets: for in regard to them, where the law gives a priority, equity will not disturb it. *Ib.*

4. Executions out of justices' courts, are liens upon the personal property only; and where the trust funds, arising from the personal property, are exhausted by prior executions, they must be placed on the same footing with the general creditors. *Ib.*

5. The assignee of an insolvent debtor, on general principles, is bound to pay all debts due and owing by the insolvent, up to the time of his making application for a discharge under the insolvent acts. *Prichett* v. *Newbold's Ex'rs*, 571

*Vide* HEIRS AND DEVISEES, 2–4.
JUDGMENT AT LAW, 7, 8.

DEED.

1. The execution and acknowledgment of a deed of conveyance is not sufficient; it must be delivered to the purchaser, actually or in contemplation of law, to pass the title. *Crawford* v. *Bertholf*, 458

2. It is not necessary that there should be an actual handing over of the instrument, to constitute a delivery; a deed may be delivered by words without acts, by acts without words, or by both words and acts. *Ib.*

3. A deed may be effectual to pass real estate, though it be left in the custody of the grantor. If both parties be present, and the contract is to all appearances consummated, without any condition or qualification annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor. *Ib.*

4. It is necessary, however, that there should be some act evincing the intent; it must satisfactorily appear, if not from acts or express words, yet from circumstances at least, that there was an intention to part with the deed, and of course to pass the title. *Ib.*

5. Where the evidence opposes the idea that there was a delivery, and proves, that although there might have been an intention to deliver, founded on the presumption that the contract was about to be consummated; yet that such intention was abandoned, and it was distinctly stated that the deed could not or would not be delivered at that time; it cannot be considered a delivery. *Ib.*

*Vide* AGREEMENT, 5.
FRAUD, 2, 7, 8.
VENDOR AND PURCHASER, 14.

DEMRURER.

*Vide* PLEADING, V.

DEVISE.

*Vide* WILL.
DOWER, 4–8.

DEVISEES.

*Vide* HEIRS AND DEVISEES.

DISCOVERY.

Where a party is not entitled to relief, he is not entitled to discovery. *Miller* v. *Ford*, 358

*Vide* INJUNCTION, 2.
JURISDICTION, 11.
PLEADING, 26.

DIVORCE.

1. A divorce *a mensa et thoro*, presupposes an existing valid marriage between the parties. It is founded on some fact, subsequent to the marriage, and does not dissolve the relation. It consists with a subsequent reconciliation of the parties, as well as subsequent cohabitation on proper terms. *Zule* v. *Zule*, 96

2. A decree for a divorce, on the ground of a prior marriage, is different from decrees of divorce, *a vinculo matrimonii*, for other causes. It proceeds on different principles, and is more disastrous in its consequences. It considers the marriage null and void; the connection between the parties meretricious, and not connubial; and the children illegitimate, and subject to all the legal disabilities of illegitimate issue. *Ib.*

3. *Semble.* That in such case the complainant would be entitled to the property she possessed before the supposed marriage, if it remained unexpended, or undisposed of. *Ib.*

4. This court, under the statute, (*Rev. Laws*, 663, s. 10,) has original jurisdiction to allow alimony, although there is no decree for a divorce. *Miller* v. *Miller*, 386

5. Articles of separation, signed by the parties, are no bar to the claim of the wife upon the husband for alimony. *Ib.*

6. When a wife voluntarily leaves her husband, but afterwards offers to return, if he refuses to live with her and neglects to provide for her, the court will order a suitable maintenance to be provided for her by her husband. *Ib.*

7. The usual course is, to refer it to a master, to ascertain and report what ought to be paid for the wife's support. But testimony having been taken, and the matter debated on the hearing, and neither party requesting a reference, the allowance was fixed by the court. *Ib.*

8. A charge in the petition, that the defendant since his marriage hath committed adultery, without setting forth time, place, or circumstances, is too general. *Clutch* v. *Clutch*, 474

9. Upon evidence of extreme cruelty, though not a case of the most aggravated character, a separation decreed for the term of three years; and the child, being of tender years, committed to the custody of the mother. *Ib.*

10. *Query.* Whether a charge for adultery, and a charge for extreme cruelty, ought to be joined in the petition. *Ib.*

*Vide* EVIDENCE, 12, 13.
WILL, 12.

## DOWER.

1. At common law, and independent of our statute, it is a settled rule at this day, that express words of exclusion are not necessary in a will in order to bar dower; it is sufficient if there be a manifest and unequivocal intention. *Stark* v. *Hunton*, 216

2. This intent must be so plain as to admit of no reasonable doubt. The claim of dower must be inconsistent with the will, or so repugnant to its provisions as to disturb and defeat them. *Ib.*

3. If the intent be doubtful or ambiguous, the legal title of the widow will prevail. *Ib.*

4. In the following devise: "I give, devise and bequeath unto my wife Jane all my tavern-house and lot where I now live, together with all the furniture and stock in the same; to have and to hold to my said wife Jane during her natural life, provided she remains my widow: but in case she should marry again, then it is my will that my said tavern-house and lot and premises be disposed of *according to law;*" the manifest intent of the testator is, that it should be in lieu of dower, at least in the premises so devised. *Ib.*

5. The acts of the widow while in possession, treating the property as her own, altering and improving the property to enhance the annual value, leasing it out for a number of years, reserving the rent to herself; are consistent only with the fact, that she considered herself as holding under the will, and amount to an acceptance of the devise. *Ib.*

6. The widow having married again, her estate is defeated; she cannot afterwards claim her dower, and the devised premises must go, according to the directions of the will, to those lawfully entitled; that is, to the child-

ren of the testator, and those representing them. *Ib.*

7. The object of the statute of the 24th of February, 1820, (*Rev. Laws*, 677,) was, to compel the widow, in all cases where land had been devised to her, to elect between the bounty of her husband and her legal rights, and to prevent her enjoying both. By the just and reasonable construction of this act it extends to all lands and real estate embraced in the will of the testator. *Ib.*

8. The intent of the act is, that the widow should not be entitled to dower in any lands devised by will, where, under the same will, she took an interest in land or real estate as devisee. *Ib.*

9. How far the statute may apply to after acquired lands, or other real estate of which the testator may be considered as dying intestate, *query*. *Ib.*

10. Where the widow of the debtor unites with his trustees in the sale and conveyance of his real estate, she is entitled to one third of the net proceeds of the sale for her dower. *State Bank at Elizabeth* v. *Marsh*, 288

*Vide* LEGACY, 3–6

E.

EASEMENT.

*Vide* WILL, 7.

ELECTION.

1. Where a plaintiff sues both at law and in equity for the same thing, he will, after answer filed, be put to his election in which court he will proceed; and if he elect to proceed at law, or neglect to make his election in proper time, his bill will be dismissed. *Conover's Ex'rs* v. *Conover*, 403

2. Where no steps have been taken in the suit at law, but testimony has been taken on both sides in this court relative to the same claim, and the suit has proceeded in this court without objection; the complainant will be considered as having made his election, and any further proceedings at law will be stayed by injunction. *Ib.*

*Vide* DOWER, 5, 7.
LEGACY, 6.

EQUITY OF REDEMPTION.

*Vide* MORTGAGE, III.

ESTATE.

*Vide* WILL.

EVIDENCE.

1. A witness, who may be responsible as an endorser on one or more of several notes, is a competent witness between two other endorsers of the same notes, against whom judgments had been obtained, and their respective properties sold, subject to redemption; as to the terms of a subsequent agreement between them, concerning a resale of the property: his responsibility as an endorser does not create an interest in the event of that suit. *Wilson* v. *Hillyer*, 63

2. When there is nothing in the suit to change the liability of the witness; or when the change, if any, is only in the person to whom the witness is answerable, and his responsibility, in all events of the cause, is equal; the witness is not disqualified. *Ib.*

3. The declaration of one party, in the absence of the other, after an agreement made, touching the terms of that agreement, is not competent evidence for the party making the declaration. *Ib.*

4. When a bond has been casually lost, a party is at liberty to come into this court for discovery, or for discovery and relief. If he comes for discovery and also for relief, it is usual to attach to the bill an affidavit of the loss of the deed. *Miller* v. *Wack*, 204

5. The affidavit is not required as *evidence of the loss*, but to establish the propriety of this court's exercising *jurisdiction*. If the defendant by his

answer does not admit the loss, the complainant is put upon his proof. *Ib.*

6. The rule in courts of law, is, that a party in a cause alleging the loss of a paper, is competent to prove such loss, for the purpose of letting in secondary evidence of the contents; but the court will be careful that such evidence is confined strictly to the fact of loss. *Ib.*

7. The oath of the defendant, in his answer, that the mortgage (he sets up) was *taken away and cancelled by the mortgagor fraudulently, and without his consent,* is to the very point in controversy, and does not come within the rule which admits the oath of a party to prove the loss of a paper, for the purpose of letting in secondary evidence of the contents. *Ib.*

8 The answer of the defendant is no evidence of the fraudulent abduction of the mortgage: it cannot be admitted to repel the strong presumptive evidence of payment or satisfaction, arising from the cancellation of the mortgage on the record. *Ib.*

9. Parol evidence is inadmissible to disannul or substantially vary a written agreement, except on the ground of mistake or fraud. *The Society for Establishing Useful Manufactures* v. *Haight,* 393

10. Where there is a clear subsequent and independent agreement, evidence of it may be received; but not where it is a matter passing at the same time with the written agreement. *Ib.*

11. There are instances where a general understanding and practice may be set up to *explain* a written agreement, but it must amount to a custom, and be pleaded as a custom from time immemorial; such as the custom in favor of the tenant's taking the way-going crop; but even such custom cannot be insisted on, if it be excluded by the terms of the agreement. *Ib.*

12. In divorce cases the court takes the confessions of parties with very great caution, and they are never held sufficient without strong corroborative circumstances. *Clutch* v. *Clutch,* 474

13. A voluntary affidavit taken before a magistrate is inadmissible as evidence. *Ib.*

14. Where the bill goes on an original agreement in writing, and does not mention the loss of it, so as to admit of any evidence in lieu of it; parol evidence of its contents, or a paper purporting to be a copy of it, is not sufficient; but the pleadings may be amended to get at the merits of the case. *Axtell's Adm'r* v. *Axtell,* 494

15. If the original agreement has been lost, and due diligence has been used to recover it, but without effect; a copy may be received, or if there be no copy the party may resort to parol proof of the contents. *Ib.*

16. The complainant is competent to prove the loss. But his testifying, that the paper was in his possession some time, and he left it with the arbitrators, (to whom the matter had been referred,) since which he has not seen it; that he has often searched for it among his own papers, the papers of his decedent, and wherever he supposed it probable it might be found, but could not find it, and believes it lost or destroyed; and one of the arbitrators stating, that the original agreement was before the arbitrators at their first meeting, that he has seen it since, but does not know what has become of it, (the other two arbitrators not having been examined, or called on,) is too indefinite to show the loss of the original agreement, and warrant the introduction of secondary evidence. *Ib.*

17. Upon satisfactory proof of the execution and existence of a deed, and the oath of the party that it is lost, secondary evidence of the contents may be admitted. *Stafford* v. *Stafford,* 525

18. Evidence going to show that a deed might have been obtained by fraud, misrepresentation, or deception, is not sufficient to support a bill charging that the deed is false, forged, and counterfeited. *Ib.*

19. The appearance of a corporate seal to an instrument, is evidence that it was affixed by proper authority. A mortgage, signed by the president and

cashier of a bank, and sealed with the corporate seal, is, *prima facie*, duly and lawfully executed. *Leggett* v. *The New Jersey Manufacturing and Banking Co.*, 541

20. But, while the common seal is held evidence of the assent and act of the corporation, the court may look beyond the seal, and inquire in what manner, and by what authority, it was affixed; and it may be shown that it was affixed without proper authority. The burden of proof is on the party objecting. *Ib.*

21. If the doctrines held by any religious society be important in determining a question of property: the party who would avail themselves of their doctrines, must prove them. *Hendrickson* v. *Decow*, 577

22. A bond and mortgage, being sealed instruments, import, *prima facie*, a valuable consideration; yet the defendants are at liberty to inquire into the consideration; but the *onus probandi* is on them, and unless they can impeach it, the instruments must stand. *Wanmaker's Ex'rs* v. *Van Buskirk*, 685

EXECUTION.

*Vide* DEBTOR AND CREDITOR, 4.
JUDGMENT, 5–9.
SHERIFF, 4.

EXECUTION CREDITOR.

*Vide* DEBTOR AND CREDITOR, 2.
JUDGMENT, 5–9.

EXECUTORS AND ADMINISTRATORS.

1. Executors of a mortgagee, standing in the place of a testator, have an interest in the controversy; the mortgage is in their hands, and they have a right to come into this court, to be satisfied the amount of it, out of the property bound by it, or its proceeds. If probate was granted without the state, *query*. *Copper* v. *Wells*, 10

2. A claim for rent due the testator, not having been mentioned in the inventory, or the executors having settled their accounts in the orphans' court, and on the credit side prayed allowance for it, as not being collected; cannot conclude them as against the debtor: they may still recover, and in case of recovery they are liable, notwithstanding the account, to those beneficially interested. *Conover's Ex'rs* v. *Conover*, 403

3. When executors have settled their account in the orphans' court, if there be no evidence of fraud or mistake, this court will not disturb the settlement; but take the balance stated in the account to be the true balance in the hands of the executors. *Ib.*

4. The vested right of a legatee, upon his death, is transmitted to his personal representatives. *Shaver* v. *Shaver*, 437

5. The next of kin are not the personal representatives, and cannot, as such, come into court representing the ancestor. *Ib.*

6. Where a legatee died before receiving his legacy, without a will, and there had been no administration; a bill filed by his next of kin, to recover the amount due on the legacy, held bad on demurrer: such a claim could be properly made only through the medium of an administrator. *Ib.*

7. The next of kin may come into this court seeking their rights against administrators, calling them to account, or seeking a distributive share of the intestate's estate. They have a direct interest, which they may lawfully assert. *Ib.*

8. After payment of debts, the administrator is trustee for the benefit of the next of kin, alone; and they may proceed against him directly for what is due them. *Ib.*

9. The power of the administrator is over all the estate, not only for the purpose of paying debts, but for the purpose of distribution; and if he come into court, on good ground of equity, seeking to recover assets, the court will aid him, without inquiring whether they are to be appropriated to pay debts, or to be distributed among the next of kin. *Ib.*

10. Where, after administration granted, it was found that the personal estate was insufficient to pay debts; and the elder children, having been advanced in money and goods, agreed with the administrators, in writing, to account for the advancement made to them, to save the real estate from being sold for the payment of debts, and to do justice to the younger children who had received nothing from their father; such an agreement is equitable in itself, and should be carried into execution. *Axtell's Adm'r* v. *Axtell*, 494

11. And the fact, that after the agreement, the authority of the administrators who made it had been revoked, and administration granted to the present complainant, does not present any obstacle to the execution of the agreement. *Ib.*

*Vide* ORPHANS' COURT, 2–4.

F.

FEIGNED ISSUE.

*Vide* ISSUE.

FRAUD.

1. There are four species of fraud. 1. Fraud may arise from facts and circumstances of imposition. 2. It may be apparent from the intrinsic value and subject of the bargain itself—such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other. 3. It may be inferred from the circumstances and condition of the parties contracting; for it is as much against conscience to take advantage of a man's weakness or necessity, as his ignorance. And, 4. It may also be collected from the nature and circumstances of the transaction, as being an imposition on third persons. *Hinchman* v. *Eman's Adm'r*, 100

2. In cases of fraudulent transfers or assignments, the court will consider the conveyance as void, and the property as bound by the judgment and execution; and will give effectual relief to the diligent creditor. *Disborough* v. *Outcalt*, 298

3. It is a well settled principle, that relief is to be obtained in this court not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition. *Crane* v. *Conklin*, 346

4. If there has been the suppression of a truth, or the suggestion of a falsehood, whereby a party is circumvented or deceived, equity will relieve against it. *Ib.*

5. Where undue advantage has been taken of the weakness or necessity of the party, or of any situation in which he is placed, rendering him peculiarly liable to imposition, this court will interfere. It proceeds on the safe principle, of protecting those who are not able to protect themselves. *Ib.*

6. It has become the settled rule of this court, that it will not interfere to assist a person on the ground of intoxication merely; but if any unfair advantage has been taken of his situation, it will render all proper aid. *Ib.*

7. Inadequacy of price can never be the ground of setting aside a deed, unless accompanied with fraud or misrepresentation; but this is only where the party is able to contract. Where the party was intoxicated, inadequacy of price is direct evidence of fraud. *Ib.*

8. The fact of the price not being paid, is no ground to set aside a deed. The fraud must be in the original transaction, and not in the non-fulfilment of the contract. But though it does not change the nature of the transaction, it may, if proved, be strong testimony to show its real character. *Ib.*

9. It is a general rule in equity, that when a person having rights, and knowing those rights, sees another person take a mortgage upon property, without disclosing his title, he shall not be allowed afterwards to set up his title to defeat the mortgage. The same principle applies to other transactions. *Crawford* v. *Bertholf*, 458

10. The cases under this head of equity all go on the ground of misrepresentation or fraudulent concealment, whereby an innocent person is induced to do what he otherwise would not do *Ib.*

11. A party, to be charged on the ground of concealment, should be aware of his rights. Fraud implies knowledge; if there was a mistake, this court will not consider it fraud. *Ib.*

*Vide* JURISDICTION, 5.

G.

GUARDIAN AND WARD.

*Vide* MORTGAGE, 10.

H.

HEIRS AND DEVISEES.

1. Where land is not devised, but a mere power of sale given to the executors, between the death of the testator and the sale of the land, the beneficial interest is in the heirs: they are entitled to the rents and profits, and have a right to make a disposition or transfer of their vested interest. *Herbert* v. *Tuthill's Ex'rs,* 141

2. At common law, the heir became personally liable to specialty debts of the ancestor, by reason of the lands descended, to the extent of their value. The statute (3 *W. and M.* c. 14) placed the heir and devisee on the same footing. They are personally responsible after alienation of the estate, as if they still held it: but *bona fide* purchasers under them never were liable; the lands in their hands are discharged. *Skillman* v. *Van Pelt,* 511

3. Our statute "for the relief of creditors against heirs and devisees," passed 7th March, 1797, extends the remedies to all debts of the ancestor, whether by specialty or otherwise; yet preserves the principle that *bona fide* purchasers shall be protected. *Ib.*

4. The "further supplement to the act making lands liable to be sold for the payment of debts," passed 12th December, 1825, creates a lien on the real estate of the ancestor or devisor, for one year after the decease; and it may be sold by virtue of an order of the orphans' court, if obtained within that time; which presupposes, that before that act no such lien existed. *Ib.*

*Vide* LEGACY.

HUSBAND AND WIFE.

1. A marriage contract in this country by a man having a former wife living in Scotland at the same time, is invalid from the beginning and absolutely void. The first contract still existed; it was not affected by the fact, that the husband and wife resided in different quarters of the globe. Nothing save death, or the judicial sentence of some competent tribunal, can dissolve the marriage relation. *Zule* v. *Zule,* 96

2. An agreement between man and wife to live in a state of separation, cannot be recognized in this court as valid, and such agreement is a direct contravention of the marriage contract. It is contrary to sound policy as well as morality, that the parties who have entered into the marriage state should be permitted to separate, and agree that they will live in a state of separation, and free from the obligations imposed on them by the marriage. The marriage contract cannot be annulled and cancelled, nor the parties absolved from their obligations of it, by their private agreement. *Miller* v. *Miller,* 386

3. The effects of the marriage are, that the husband and wife are one person: he hath power over her person as well as estate, and he is bound to maintain her in a suitable manner, according to his circumstances: the wife, by marriage, has parted with her property, and placed herself under the control of her husband, and looks to him for support. *Ib.*

4. When a wife voluntarily leaves her husband, but afterwards offers to return, if he refuses to live with her and neglects to provide for her, the court will order a suitable maintenance to be provided for her by her husband. *Ib.*

## I.

## IDIOTS AND LUNATICS.

1. On an inquisition returned finding a person lunatic and of unsound mind at that time, and for five years last past, a third person representing himself to be the attorney in fact of the alleged lunatic, cannot be heard upon petition by him praying that the inquisition may be quashed, or a new commission issued, or a traverse ordered; he is not interested as a purchaser whose title might be affected by the inquisition, neither is he liable as vendor, the lunatic himself having executed the deeds; he has no interest which entitles him to be heard. *Covenhoven's case,* 19

2. A stranger cannot sue out a commission in the nature of a writ *de lunatico inquirendo,* nor can he make himself party to it by application to this court; he has no right to interfere in a proceeding of this nature. The party who seeks to quash the inquisition or traverse the finding of the jury, should have an actual interest, legal or equitable, which would be endangered by the finding of the jury, and that should be manifested to the court. *Ib.*

3. Applications on the part of third persons in matters of lunacy are not encouraged, yet they will be listened to and granted when actual *bona fide* interests and rights are endangered. *Ib.*

4. A person found lunatic may appear and traverse the inquisition by attorney, but an idiot must appear before the court in person. *Ib.*

5. The petition for a commission of lunacy should be accompanied by affidavits, *evincing the lunacy of the party.* This may be, by setting forth the unsound state of the mind of the person against whom the commission is prayed, and mentioning such instances of incoherent conduct or expression, as prove him unfit to continue in the management of his own affairs. An affidavit setting forth no particular act or expression of the alleged lunatic, from which the court could form an opinion of the propriety of granting the commission, but stating expressly, that for the space of six or seven years last past, the deponent has, by frequently observing the behaviour and actions of the alleged lunatic, looked upon him to be deprived of his reason and understanding, so as to be incapable of the government of himself, and incompetent to manage his own affairs, is sufficient. after inquisition returned, to sustain it as regularly issued. *Ib.*

6. It is not necessary that the inquest should be held at the dwelling-house of the lunatic; if held at a suitable place in the neighborhood, not so remote as to induce the suspicion of unfair practice, or to preclude the jury from inspecting the lunatic, it is sufficient. *Ib.*

7. It is not necessary that the evidence taken before the jury should be reduced to writing and returned with the inquisition. *Ib.*

8. Where the lunacy at the time of the inquisition found is not questioned, but a traverse is sought to vary the time at which the lunacy commenced, to exempt from its operation a will executed by the lunatic within the period of the lunacy, with respect to which the inquisition is not conclusive, it will not be granted. *Ib.*

## IGNORANCE OF LAW.

*Vide* AGREEMENT, 3.

## INJUNCTION.

1. An injunction cannot issue against the purchasers of mortgaged premises, they not being parties to the bill to foreclose. *Vanderveer* v. *Tallman,* 9

2. Matters of defence, having come to the complainant's knowledge since the trial at law, are proper grounds for granting an injunction and requiring discovery. *Camman* v. *Traphagan's Ex'r,* 28

3. Past injuries are in themselves no ground for an injunction: the province of the injunction is, not to afford a remedy for what is past, but to prevent future mischief. If the injuries were continued, or the right to continue them set up and persisted in by

the defendants, this court would, if the facts were properly established, interfere by injunction effectually to protect the complainants. *Society for Establishing Useful Manufactures* v. *Morris Canal*, 157

4. The power of the court to grant injunctions in case of nuisance is unquestionable; but the exercise of the power must always rest in the sound discretion of the court, to be governed by the nature of the case. *Ib.*

5. Upon a bill filed, and injunction allowed, to restrain proceedings at law, and a plea of a judgment recovered; upon which issue was joined and proofs taken in support of the plea:—The facts of the plea appearing to be proved, the injunction was dissolved, and the bill dismissed with costs. *Camman* v. *Traphagan's Ex'r*, 230

6. An order in the nature of an injunction may be made to stay proceedings in this court. *Miller* v. *Ford*, 358

7. When the facts are such as constitute no defence at law, though properly produced; if they are matters of which a court of law can take no cognizance, and such as are peculiarly within the province of a court of equity, there can be no objection to the bill on the ground that it was not filed pending the suit at law, and an injunction cannot be dissolved on that ground. *Quackenbush* v. *Van Riper*, 476

8. When a charge is not fully answered, yet if the complainant do not show himself entitled to claim the equity growing out of that transaction, it will not stand in the way of dissolving the injunction. *Ib.*

9. When the answer is sufficient, and the complainant's equity denied, the injunction will be dissolved. *Ib.*

10. The distinction in the English books, between a common injunction which issues on some default of the defendant, and special injunctions granted on special application to the court, is of no importance. All injunctions here are granted on the merits and on special application to the court, and generally *ex parte*, on filing the bill. *Buckley* v. *Corse*, 504

11. Whether notice shall be given depends on no settled rule of practice, but on the nature of the case. If it be one of great difficulty or importance, the court will generally require notice to be given. *Ib.*

12. After filing the bill, and appearance, application for injunction may be made without notice, and if it be a case that requires it, notice will be ordered. *Ib.*

13. Where application for injunction is made after answer filed, notice is necessary according to the thirtieth rule of practice; but even then it may be dispensed with. *Ib.*

14. An injunction allowed by a master on application after answer, and without notice, is irregular, unless the notice was dispensed with by the master; which, if it be a proper case, may be presumed to have been done. *Ib.*

15. If there was no dispensation, the court would not set aside the injunction simply for that reason, if it appeared to be a case in which the rule might properly have been dispensed with; but would retain it, and order the complainant to pay the cost of the application. *Ib.*

16. After an injunction dissolved on the merits the party may amend and obtain an injunction on the amended bill. *Ib.*

17. There can be no doubt of the power of this court to stay the commission of waste by injunction; it is constantly exercised, and is necessary to the administration of justice. *Southard* v. *Morris Canal and Banking Co.*, 518

18. Even in cases of trespass, courts of equity have repeatedly held, that when the damage was great and irreparable, or by constant repetition calculated to do lasting injury to the inheritance, they would interfere to prevent the evil. *Ib.*

19. The power of a court of equity to interpose by injunction in cases of waste, private nuisance, and great and irreparable injury to the inheritance is well established. It does not rest on modern or questionable decisions, but

is ancient, uniform, and not now to be shaken. *Scudder* v. *The Trenton Delaware Falls Co.*, 694

20. The late cases have so construed this power as to embrace trespasses of a continuous or extraordinary character; and have gone upon the ground, that the property to be protected was of peculiar value, for the injury or destruction of which a recompense in damages could not be made. *Ib.*

*Vide* ELECTION, 1.
PRACTICE, 9, 10, 12.

INTEREST.

*Vide* ADVANCEMENT, 3.
LEGACY, 3-5.

INTOXICATION.

*Vide* FRAUD, 6, 7.
VENDOR AND PURCHASER, 3.

ISSUE.

1. It is the province and the duty of this court, to decide upon the facts and the law, except in cases of real difficulty, growing out of contradictory testimony, or opposing facts and circumstances, which it is impossible for the court to reconcile: then an issue is directed to inform the conscience of the court. *Miller* v. *Wack*, 204

2. Questions of law and fact (as to the existence and validity of deeds, &c.) may be investigated and tried under the direction of this court, either by a feigned issue, or by an action at law, brought and prosecuted under the direction of this court. *Decker* v. *Caskey*, 427

3. Form of *directions* for prosecuting an ejectment in the supreme court, under the direction of the court of chancery, to try questions as to the existence and validity of a deed under which the mortgagor derived title. *Ib.*

*Vide* DAMAGES, 2.

JUDGMENT AT LAW.

1. A judgment at law is final and conclusive as to all matters of defence within the parties' knowledge at the time the trial at law took place. *Camman* v. *Traphagen's Ex'r*, 28

2. The omission to file a state of demand in the court for the trial of small causes, might authorize the reversal of the judgment in a proper tribunal, but is no ground for the equitable interference of this court. *Jackson* v. *Darcy*, 194

3. If the want of an affidavit is fatal to the judgment, and renders void the execution and sale, so that no title was conveyed to the purchaser as against the complainant, it must be by force of the statute; if so, they are as inoperative in courts of law as in a court of equity, and the decree of this court is not necessary to make manifest the nullity of these proceedings. *Ib.*

4. Errors and irregularities in a judgment at law are to be corrected in some direct proceeding, and are not subject to exception when the proceedings are collaterally drawn in question. *Camman* v. *Traphagen's Ex'r*, 230

5. At law, a judgment and execution constitute no lien on mere equitable rights, which are not susceptible of delivery, or possession: they operate on legal rights only; there must be a *seisin*, and this term always has reference to a *legal* title. The same principle is established in reference to mere equitable interests in personal property; they are not subject to levy and sale. *Disborough* v. *Outcalt*, 298

6. On this subject the decisions in courts of equity are in accordance with those at law. They consider the rights growing out of a judgment and execution at law, as *legal* rights; and while this court will, on various principles of equity, aid the courts of common law in the prosecution of legal rights, it will not undertake to enlarge or extend them. *Ib.*

7. In cases of fraudulent transfers or assignments, the court will consider the conveyance as void, and the prop-

erty as bound by the judgment and execution; and will give effectual relief to the diligent creditor. *Ib.*

8. An execution creditor at law has a right to come into this court and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate; and the party so redeeming will be entitled to a preference according to his legal priority. *Ib.*

9. A party, by his execution at law, obtains no vested interest in mere equitable rights, such as this court will aid him in securing, unless they are connected with some fraudulent or colourable disposition of property; or some direct trusts, where the contract has been executed and the *cestui que trust* is in a situation to call on the trustee for the property; or where there is a right of redemption, as in cases of pledges or mortgages. *Ib.*

*Vide* JURISDICTION, 4–7, 14, 15.
MORTGAGE, 2, 20–22.

JUDGMENT CREDITOR.

*Vide* DEBTOR AND CREDITOR.

JURISDICTION (OF CHANCERY.)

1. It is a well settled principle that a court of equity has no power to compel a party to appoint an arbitrator. *Copper* v. *Wells*, 10

2. Equity will not interpose to effect the forfeiture of a privilege, the divesting of an estate, the taking away of a right by condition, subsequent or otherwise, or the discovery of some matter which may render an act done illegal and thereby subject the party to a penalty. But this rule does not apply to the case of reforming a mistake in a bond for the prison limits. *Smith* v. *Allen*, 43

3. When the proof of a mistake in a bond is full and satisfactory, equity will relieve, even against securities; and that as well where the complainant seeks relief affirmatively, on the ground of the mistake, as where the defendant sets it up to rebut an equity: such a case is not within the statute of frauds. *Ib.*

4. On a bill for relief against a verdict and judgment at law, the verdict must be taken as conclusive upon the facts before the jury: there can be no appeal to a court of equity, by way of new trial. *Glover* v. *Hedges*, 113

5. There are cases, nevertheless, in which the court will interfere to prevent fraud or gross injustice: where there has been a fraudulent concealment of facts on the part of the plaintiff, and a judgment obtained against conscience, equity will relieve. *Ib.*

6. It must appear, however, that the party seeking relief has used all proper diligence to defend himself at law: the possession of new testimony, which with proper care might have been produced before, is no ground for a new trial at law, much less for an equitable interference with the judgment. *Ib.*

7. The court ought to be perfectly satisfied of its grounds, before it undertakes to defeat the right which a party has acquired by the verdict of a jury; especially, when such verdict is the result of an investigation of facts. There ought to remain no reasonable doubt. *Ib.*

8. The court of chancery is not the proper tribunal for calling in question the rights of a corporation, as such, for the purpose of declaring its franchises forfeited and lost. *The Society for Establishing Useful Manufactures* v. *The Morris Canal and Banking Co.*, 157

9. The omission to file a state of demand, might authorize the reversal of the judgment in a proper tribunal, but is no ground for the equitable interference of this court, *Jackson* v. *Darcy*, 194

10. It should be a very strong case to induce this court to injoin proceedings at law on the ground of multiplicity of suits; but if the right should be established in favor of the defendant at law, and the plaintiff should persist in any oppressive proceedings, this court will promptly interfere. *Semble.* That the court of chancery

will not interfere to restrain proceedings at law, where the law affords an adequate remedy. *Ib.*

11. When a bond has been casually lost, a party is at liberty to come into this court for discovery, or for discovery and relief. If he comes for discovery only, it is in aid of his common law remedy. If he comes for discovery and also for relief, it is usual to attach to the bill an affidavit of the loss of the deed. *Miller* v. *Wack*, 204

12. This affidavit is not required as *evidence of the loss*, but to establish the propriety of this court's exercising *jurisdiction*. If the defendant by his answer does not admit the loss, the complainant is put upon his proof. *Ib.*

13. Equity, in rescinding contracts, does not confine itself to cases of fraud; cases of plain mistake or misapprehension of right, though not the effect of fraud or contrivance, are likewise entitled to the interposition of the court *Skillman* v. *Teeple*, 232

14. Courts of equity will, in some cases, aid execution creditors to obtain satisfaction of their demands. But to warrant its interference, there must be some equitable ground presented; the case must be infected with fraud, or it must involve some trust or other matter of peculiar equity jurisdiction. *Disborough* v. *Outcalt*, 298

15. When a party comes into this court to obtain satisfaction of a judgment, he must present himself under some head of equity jurisdiction: he must show that the debtor has made some fraudulent disposition of his property, or that the case stands infected with some trust, collusion or injustice, against which it is the province of this court to give relief. *Ib.*

16. It will interfere to remove equitable incumbrances, standing in the way of the parties' claim at law; and being once possessed of the case, it will ascertain and settle the rights of all parties concerned. *Ib.*

17. It does not follow, that because a party may resort to an action of ejectment, he has no remedy in this court. The principle is too broad, and the practice of the court against it. There are many cases in which the jurisdiction of courts of law and equity are concurrent, and the party is at liberty to seek relief in either. *Crane* v. *Conklin*, 346

18. This court may control the proceedings of other tribunals, for the purpose of administering more complete justice; it is one of its most valuable powers: it may control its own proceedings to attain the same object. *Miller* v. *Ford*, 358

19. Where a corporation has been duly organized, and thereby acquired a legal existence, a court of equity will not, upon an alleged non-user or misuser of its corporate privileges, declare the charter to be forfeited; such a power is of right to be exercised by a court of law and not a court of equity. *Attorney-General* v. *Stevens*, 369

20. Where there is a mere allegation of an outstanding title or incumbrance, this court will not interfere, but will leave the party to his remedy on the covenant; but where there is an eviction, or even an ejectment brought, it will interfere. *Shannon* v. *Merselis*, 413

21. It is the policy and duty of the court to settle all claims between the parties, in one suit, if possible; and upon a question arising between two co-defendants, where the matter is distinctly before the court, upon the pleadings and proof between the complainant and defendants in the case, the court will decide the rights of the defendants as between themselves. *Ib.*

22. It is the duty of this court never to do justice by halves, to beget business for another court; or when a cause is fairly within its jurisdiction, to leave open the door for further litigation here or elsewhere. *Decker* v. *Caskey*, 427

23. A defence which might be made at law, and which a party will omit or decline to make, cannot be the basis of a suit in equity; unless it be in case of fraud, accident or trust, peculiarly within the province of a court of equity, or when the jurisdiction of

the legal tribunal cannot admit the defence. *Quackenbush* v. *Van Riper*, 476

24. Courts of equity now go on the broad principle, that where a mistake is manifest, they will, in the exercise of their ordinary jurisdiction, correct it, and hold the party according to his original intention. *Hendrickson* v. *Ivins*, 562

25. The court of chancery, and every other court in New Jersey, has the power and the right to ascertain, by competent evidence, what are the religious principles of any man or set of men, when civil rights are thereon to depend, or thereby to be decided. *Hendrickson* v. *Decow*, 577

26. This court cannot inquire into the doctrines and opinions of any religious society, for the purpose of deciding whether they are right or wrong; but may inquire into them as facts pointing out the ownership of property. *Ib.*

27. If a fact be necessary to be ascertained by the court, for the purpose of settling a question of property, it is the duty of the court to ascertain it; and this must be done by such evidence as the nature of the case admits of. *Ib.*

28. In all cases where a corporation exceed the limits of the power given them, or abuse or misapply it, the court will interfere: but it will not give its aid, where the powers granted have been exercised in good faith; or where they are discretionary, or where the right is doubtful. *Scudder* v. *The Trenton Delaware Falls Co.*, 694

*Vide* DAMAGES, 1–3.
FRAUD, 3–6.

## JURY, TRIAL BY.

*Vide* CONSTITUTION.

## L.

## LANDLORD AND TENANT.

1. Where a party has occupied premises belonging to another, it follows, as a matter of course, that he is bound to pay for the use and occupation, unless he can show an agreement to the contrary, or a satisfactory reason why he should not be charged. *Conover's Ex'rs* v. *Conover*, 403

2. Whether there is a custom of the country, that when a party is entitled to the way-going crop he can take the grain only, and not the straw, or if he take the straw away he must return it; established in such a way as to justify this court in acting on it, where there is no written contract, *query*. *Hendrickson* v. *Ivins*, 562

## LEGACY.

1. The testator devised as follows: I devise to my son Abraham Quick the remainder of my land in Amwell, &c. "to him the said Abraham during his life time, and if he should die before his wife, she is to have the use and benefit of the said devised land for her support as long as she remains his widow and no longer; and at her decease I devise the same to his heirs, to be divided between them as the law directs when any die intestate. I have devised the last mentioned tract to my son Abraham subject to the following incumbrances, to wit: That he the said Abraham is to pay to my daughter Mary one hundred and fifty pounds, in the following manner, &c.: and he the said Abraham is to pay to my daughter Rosanna, in case she gets married, thirty-seven pounds ten shillings, to get her an outset." By this devise the *whole estate* in the devised premises, to wit, the estate for life and the remainders, is charged with the legacies: and the devisee for life having died without paying them, and his estate being exhausted, the amount due on the legacies must be raised out of the land, by sale. *Quick* v. *Quick*, 4

2. The devisee for life dying insolvent before payment of the legacies, the legatees omitting to claim the same of his administrator within the time limited by rule of the orphans' court, and a decree of the court barring creditors who had not presented their demands pursuant to the statute, do not affect the claim of the legatees to

have the legacies raised out of the lands charged. *Ib.*

3. On a legacy bequeathed to the widow in lieu of dower, interest allowed after one year from the testator's death, upon the common rule applicable to legacies generally. *Church at Acquackanonk* v. *Ackerman's Ex'rs*, 40

4. The exception allowing interest from the testator's death on legacies intended as a maintenance, applies only to infant children, and does not extend to the widow. *Ib.*

5. The allowance of interest on a legacy is not regulated by the fund out of which it is to be paid, whether productive or not. *Ib.*

6. The widow is excused in declining to make her election when required to do so by the executors, and in not accepting the legacy bequeathed to her in lieu of dower, while a controversy was pending respecting the will of the testator, so far as it affected the real estate with which her rights under the will were in a degree connected; and having afterwards, within the time directed by the court, elected to accept the legacy, she is entitled to interest on it from the expiration of one year after the testator's death. *Ib.*

7. The testator bequeathed to his daughter five thousand dollars, "to be paid to her by her brother out of the estate given to him, in annual payments of five hundred dollars a year." This legacy is a charge on the estate of the devisee, (in the devised premises,) not upon his person or upon the land. *Waltington* v. *Taylor*, 314

8. If, therefore, the estate of the devisee should cease, before the legacy is paid, the land would be discharged. *Ib.*

9. Although the devisee is not personally liable, yet the *net* annual profits of the estate, if any, are to be appropriated, yearly, to the payment of the legacy. *Ib.*

10. The legatee is entitled to have her money; and if the devisee does not pay it, in exoneration of the charge, the estate must satisfy it in some way. The legacy is absolute, and does not depend on the annual value of the estate. *Ib.*

11. The devisee is liable, personally, to account for the net profits which have come to his hands; and must be considered as holding them in trust, and responsible over to the legatee who is beneficially interested. *Ib.*

12. The vested right of a legatee upon his death is transmitted to his personal representatives. *Shaver* v. *Shaver*, 437

*Vide* EXECUTORS AND ADMINISTRATORS, 4–6.
WILL, 1–5, 10.

## LEGISLATURE, POWER OF.

1. The power of the legislature is not omnipotent; it has boundaries beyond which it may not pass. It cannot authorize private property to be taken for public use, without providing for a just remuneration; and in regard to those public rights which appertain to the citizens generally, a common property, it cannot make such disposition of them as entirely to defeat the citizens of their common rights. *Attorney-General* v. *Stevens*, 369

2. This power is not confined to cases only, where no possible injury would accrue to any individual. In every case, some inconvenience must accrue to individuals, or some privileges be measurably impaired: yet if such disposition or regulation (of the common right) be for the common benefit; if the situation of society and the wants of the public require it, individual convenience must yield, and that upon the most obvious principles of the social compact. *Ib.*

3. Private property cannot be taken for *private* use. The legislature have no right to take the property of one man and give it to another, even upon just compensation made. *Scudder* v. *Trenton Delaware Falls Co.*, 694

4. The right of the state to take private property for public use, making just compensation, is a right appertaining to sovereignty, which the state may freely exercise on all proper occasions,

and which a jury has no power to control. *Ib.*

5. This right is not limited to the actual use and occupation of the property by the state; for private property is taken, in many instances, where the state in its sovereign capacity does not and cannot occupy it. It is not limited to public political corporations; for the right of private corporations to take private property for a variety of purposes, such as canals and railroads, is not disputed at this day. *Ib.*

6. The legislature, in this state, is not omnipotent, as the British parliament. The provisions of the constitution are paramount to the power of the legislature; and whenever the legislature, in the exercise of its authority, transcends the limits clearly prescribed to it by the constitution, its acts are void; and it is the duty of the judiciary to declare them so. *Ib.*

*Vide* CORPORATIONS, 6.

LIMITATIONS, STATUTE OF.

1. The rule in courts of equity now is, that they will take notice of the statute of limitations, and apply it in the same manner as courts of law. *Conover's Ex'rs* v. *Conover,* 493

2. To take a case out of the statute, when there is no express promise to pay, but one is to be raised by implication of law, the acknowledgment of the party ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of an intention or willingness to pay, or if the expressions be vague and equivocal, leading to no certain conclusion, the evidence ought not to be admitted. *Ib.*

3. The statute of limitations does not, in its terms, apply to courts of equity; but they have always felt themselves bound by its principles, and, except in matters of strict trust, and matters purely equitable, have acted in conformity with them. *Wanmaker's Ex'rs* v. *Van Buskirk,* 685

4. If for a debt on simple contract, the creditor chooses to go into a court of equity, the defendant shall have the benefit of the statute in that court, as well as a court of law. *Ib.*

LUNATICS.

*Vide* IDIOTS AND LUNATICS.

M.

MARRIAGE.

*Vide* HUSBAND AND WIFE.

MASTER, REFERENCE TO.

*Vide* PRACTICE, III.

MERGER.

*Vide* MORTGAGE, 30.

MISTAKE.

*Vide* JURISDICTION, 3, 23.

MORRIS CANAL AND BANKING COMPANY.

*Vide* CORPORATIONS.

MORTGAGE.

*I. Of the Mortgage generally.*
*II. Assignment, Cancellation, and Priority of Mortgages.*
*III. Equity of Redemption, Foreclosure and Sale of Mortgaged Premises, and the application of the proceeds of the sale to the payment of different incumbrances in their order.*

*I. Of the Mortgage generally.*

1. Executors of a mortgagee, standing in the place of the testator, have an interest in the controversy; the mortgage is in their hands, and they have a right to come into this court, to be satisfied the amount of it, out of the property bound by it, or its proceeds. *Copper* v. *Wells,* 10

2. A mortgage given for purchase money on a sale of land, by one defendant in execution to his co-defendant, is not, on the principle of *lien for purchase money*, entitled to priority over the antecedent judgment against both, nor can it affect the title of a purchaser under the judgment, although the property was levied on and sold *as the property of the mortgagor*. *Simmons' Ex'r* v. *Vandegrift*, 55

3. Where one comes into possession under mortgage creditors, he may be considered as a mortgagee in possession; yet when he comes in purely as a volunteer, whether he ought to be placed in a situation quite so favorable, *quere*. *Clark* v. *Smith*, 121

4. Where a mortgagee in possession is necessarily put to expenses in defending or securing the title, he is entitled to an allowance for the expenditure: as where he has been put to expense in foreclosing his mortgage, or has advanced money for fines on the renewal of leases under which the premises were held, or has expended money in defending the title of the mortgagor to the estate, when his title has been impeached, it may be added to the debt of the mortgagee; and taxes, if paid by the mortgagee, are a proper charge against the estate. *Ib.*

5. But a mortgagee cannot charge for trouble and expense in receiving the rents and profits, although there may be a private agreement for such allowance between him and the mortgagor, nor for the expense of insurance, which is considered as the act of the mortgagee, for his own benefit. *Ib.*

6. So where a mortgagee in possession undertakes, without the consent and approbation of the mortgagor, to make improvements on the property, though they may be of a beneficial and permanent character, he does it at his peril, and has no right to look for an allowance at the hands of the mortgagor. If the mortgagor does not choose to have the improvements, the mortgagee has no right to impose them upon him, and thereby, perhaps, deprive him of the power of redeeming. *Ib.*

7. The ordinary rule is, that money laid out in improvements, does not create a lien. If the mortgagor, after giving the mortgage, makes improvements on the premises, the whole of them shall go, if it be necessary, to satisfy the mortgage; and so, if improvements are made by the mortgagee, they are voluntarily made, and he cannot afterwards turn round and claim allowance for them. They will enure for the benefit of the estate, and if he should suffer a loss, the maxim will well apply, *volenti non fit injuria*. *Ib.*

8. It is well settled, that as mortgagee in possession is not bound to expend money on the mortgaged premises, further than to keep them in "necessary repair;" this language has been construed strictly, and such allowance put on the ground of "absolute necessity for the protection of the estate;" for such expenditure, when incurred, he will receive allowance. *Ib.*

9. A mortgage given by a guardian to his sureties in the guardianship bond, reciting the bond given to the ordinary, and conditioned "that if the said guardian should and would faithfully comply with the condition of the said bond, by paying over to the minor mentioned in said bond, all the monies in the hands of the said guardian, as guardian of the said minor, when he arrives at full age, then the said mortgage and bond should cease and be void"—creates no *trust* for the benefit of the minor. The mortgagees are the absolute owners of the mortgage; they have the legal and beneficial interest in it, and have a right to treat it as their own. *Miller* v. *Wack*, 204

10. A second mortgagee, and those holding under him, are to be charged with *constructive notice* of the prior mortgage, on record and undischarged, at the time of the execution and recording of the second mortgage. *Ib.*

11. A bona fide mortgagee, from the heir or the devisee, shall have the benefit of his security, exonerated from all demands by means of any mere debts of the ancestor or devisor, whether by specialty or otherwise. *Skillman* v. *Van Pelt*, 511

12. A conveyance, when coupled with an agreement in writing, that if the grantor should pay a debt due to the grantee within a year, the deed should be void; is in equity nothing more than a mortgage; and the complainant is entitled to redeem on payment of the amount due. *Youle* v. *Richards*, 534

13. Whenever it can be clearly shown to be the intention of the parties that real estate, when conveyed, shall be subject to redemption, it is considered as a mere security, and can operate only as a mortgage. *Ib.*

14. The agreement, so far as it restricts the right of redemption to one year, is void. The right of redemption cannot be restricted to a limited time, or to a particular class of persons. *Ib.*

15. "Once a mortgage and always a mortgage," is an ancient equity maxim of approved policy and wisdom. *Ib.*

16. But a mortgagor, for good cause, may surrender his right of redemption, and render the title of the mortgagee absolute. *Ib.*

17. A mortgagee in possession may do no act to prejudice the estate. He is not authorized to cut down timber and commit waste upon the premises, even if the proceeds were applied to the extinguishment of the debt. *Ib.*

18 A mortgage signed by the president and cashier of a bank, with the corporate seal affixed by them, without the authority or concurrence of the board of directors, is not a valid instrument. *Leggett* v. *New Jersey Manufacturing and Banking Co.*, 541

19. A second mortgagee, having also a judgment, execution and levy on the mortgaged premises for the same debt; and being security for the mortgagor on two notes to a third person; receiving from the mortgagor a sum of money equal to the amount then due on the notes; and giving him a receipt for the money, "to be credited on the judgment, provided the debtor should indemnify him on his surety for said debtor to the holder of these notes," with a parol understanding "that the money received was not to be considered a payment by the debtor on the judgment until he should pay the amount due on these notes to the holder,"—is entitled to hold his mortgage, judgment, execution and levy, as security for the payment of all the money due to him thereon, and also upon the notes on which he is security; and this lien is perfect against the mortgagor, and all persons claiming under him by subsequent incumbrance or conveyance. *Skillman* v. *Teeple*, 232

20. By this payment, receipt and agreement, the holder of these notes acquired an interest in this second mortgage, judgment and execution, and a lien upon the mortgaged premises for the payment of the notes, prior to any other incumbrance excepting the first mortgage, which interest a court of equity will protect. *Ib.*

21. The holder of these notes (having this security for their payment, comprised in the same lien with the debt of the mortgagee, to wit, the mortgage, judgment and execution; and the mortgagee being also debtor to the holder, as security on these notes) is entitled to have the whole amount due on the notes paid out of the mortgaged premises, and to have it paid next after satisfaction of the first mortgage, although the premises should fall short of paying the whole amount due on the second mortgage, judgment and execution. *Ib.*

*Vide* EVIDENCE, 7, 8, 22.
FRAUD, 9.
PAYMENT, 8, 9.
PARTNERSHIP, 3.

*II. Assignment, Cancellation, and Priority of Mortgages.*

22. When a first mortgage is *cancelled on the record*, the legal priority attaches to the second mortgage, unless it should appear that the first mortgage was improperly and fraudulently cancelled, without payment or satisfaction, and without the consent of the first mortgagees or either of them. *Miller* v. *Wack*, 204

23. The simple *cancellation* of a mortgage on the record, is not an absolute bar, unless there has been actual satisfaction. It is not conclusive evidence; the facts may still be investigated. But it is evidence of a high

character, and sufficient to sustain the rights of all persons interested, unless the party setting up the cancelled mortgage shall show satisfactorily some *accident, mistake* or *fraud*. *Ib.*

24. It is a general rule, that where there is a bond and mortgage, the assignment of the bond operates as an assignment of the mortgage: the bond is the principal, and the mortgage is the incident. *Stevenson* v. *Black*, 338

25. Where a mortgagee assigns one of the bonds secured by the mortgage, retaining the mortgage himself; the assignee becomes equitably interested in the mortgage to the amount of his debt or bond, and the holder of the mortgage a trustee for the assignee of the bond, *pro tanto*. *Ib.*

26. But the assignee of the bond has not any claim against the mortgagee, personally, growing out of the transfer of the bond; his claim is upon the mortgage or the estate bound by the mortgage, and that claim remains, no matter in whose hands the estate may be. *Ib.*

27. The assignee of the mortgage stands, *quo ad hoc*, in the shoes of the mortgagee; his rights and liabilities are the same, and not different. *Ib.*

28. The assignee of a bond and mortgage holds them subject to the same equity that existed against them in the hands of the mortgagee. *Shannon* v. *Marselis*, 413

*III. Equity of Redemption, Foreclosure and Sale of Mortgaged Premises, and the application of the proceeds of the sale to the payment of different incumbrances in their order.*

29. It is not a necessary consequence, when the legal and equitable titles meet in the same person, that the equitable title becomes merged in the legal. When the holder of a mortgage takes a release or conveyance of the equity of redemption, a court of chancery will consider the mortgage as subsisting, when the purposes of justice require it. *Hinchman* v. *Emans' Adm'rs*, 100

30. On general principles, the purchaser of an equity of redemption is not personally liable for the amount of the mortgage debt; by the purchase and sale the liability is not changed as between the mortgagor and mortgagee; the obligor is still liable to the obligee on his bond, and the obligee or his assignee cannot transfer the personal liability to the purchaser. *Stevenson* v. *Black*, 338

31. As between the mortgagor and the purchaser of a simple equity of redemption, where the mortgage money constitutes, in fact, a part of the consideration of the purchase; the mortgagor has a right to be indemnified by the purchaser, against all personal liability on the bond. *Ib.*

32. The uniform language of a court of equity is, that where the purchaser (of an equity of redemption) is in possession and receives the rents and profits, there is raised upon his conscience, independently of any contract, an obligation to indemnify the vendor against the personal liability to pay the mortgage money. *Ib.*

33. By a mortgagee, or assignee holding one of the bonds secured by a mortgage, becoming the purchaser of the equity of redemption, that part of the mortgage debt due to himself on the bond he holds, is extinguished. *Ib.*

34. After a mortgage is given, the ultimate payment thereof cannot be defeated by any conveyance of the mortgaged premises that may be made by the mortgagor. *Shannon* v. *Marselis*, 413

35. But where new rights or interests have originated since the execution of the mortgage, although the mortgagee is no party to them, and they may delay him in the prosecution of his remedy; yet the court will protect them, and direct the mortgage to be paid out of such parts of the property as may be most equitable to all parties concerned. *Ib.*

36. Where a mortgagor, after giving a mortgage, sells part of the mortgaged premises to a third person for a valuable consideration; justice demands that the residue of the premises in the hands of the mortgagor should

satisfy the mortgage debt; and the purchaser acquires a right, even against the mortgagee, to compel him to have recourse to such residue for the satisfaction of his debt. *Ib.*

37. If the mortgagor sells a second parcel, this second purchaser acquires rights as against the mortgagor and mortgagee; rights also arise as between the first and second purchasers, as to their liability to the mortgage; all which the court will notice and protect. If the property remaining unsold in the hands of the mortgagor is sufficient to pay the debt, both purchasers will be protected; if insufficient, the last purchaser contributes first, and if there still be a deficiency the first purchaser may be called on: thus the last purchaser is first liable. *Ib.*

38. The first mortgagee having prosecuted his bond to judgment and execution at law, under which he purchased the mortgaged premises at sheriff's sale, took possession and received the rents and profits. The second mortgagee is entitled to redeem, upon paying the principal and interest of the first mortgage, together with the costs incurred in obtaining the possession; deducting thereout the rents and profits received, or that with reasonable diligence might have been received by the first mortgagee while in possession. *Hill* v. *White*, 435

39. In such case, it is not the practice to allow interest on the cost; nor can any thing be allowed for renting and taking care of the property, or for any thing except necessary repairs. *Ib.*

40. Where A. has a first mortgage on two lots, and B. takes a second mortgage on the first lot only; he may, as between him and the first mortgagee, compel the satisfaction of the first mortgage out of the second lot, as far as the proceeds will go. *Mickle's Ex'r* v. *Rambo*, 501

41. A release, afterwards given, by the first mortgagee to the mortgagor, of all his interest in the second lot, will not prejudice the second mortgagee, unless he assented to it. *Ib.*

42. The purchaser of the equity of redemption of the first lot, subject to both mortgages, in order to redeem, would have to pay the whole of the second mortgage covering the first lot only, and a ratable portion of the first mortgage on both lots, according to the value of the two lots. *Ib.*

43. Upon a subsequent sale of the first lot, on a bill filed by the first mortgagee, the proceeds are to be applied to satisfy, first, a ratable portion of the first mortgage, then the whole of the second mortgage, and subsequent incumbrances on the first lot in their order. *Ib.*

*Vide* MORTGAGE, I. 13–17.

N.

NE EXEAT.

*Vide* PRACTICE, III.

NEW TRIAL.

*Vide* JURISDICTION, 4.

NEXT OF KIN.

*Vide* EXECUTORS AND ADMINISTRATORS.

NOTICE.

When one affected with notice conveys to one without notice, the assignee, in case he has the legal estate, shall be protected. *Crawford* v. *Bertholf*, 458

*Vide* MORTGAGE, 10.
VENDOR AND PURCHASER, 1.

NUISANCE.

*Vide* INJUNCTION, 4, 19.

O.

ORPHANS' COURT.

1. A decree of the orphans' court on a matter over which it has jurisdiction,

if fairly obtained, is not to be questioned; but it is a court of limited powers, and if it transcends its jurisdiction its acts will pass for nothing: and if an order is obtained by fraud or misrepresentation, it may be set aside or considered null. *Gray* v. *Fox*, 259

2. An order of the orphans' court, approving the investment of minors' money by administrators or trustees, without the leave and direction of the court obtained previous to such investment, is not made in pursuance of any authority vested in the court, is not within its jurisdiction, and therefore is no protection to the administrators. *Ib.*

3. The proper course to be pursued under the eleventh section of the act of thirteenth June, eighteen hundred and twenty, (*Rev. Laws*, 779,) is to obtain the leave and direction of the court for the purpose of putting out the money; and not to put out the money first and obtain a decree of confirmation afterwards. *Ib.*

4. Although a farther security may be offered after the loan is made, and the court may approve that security; that does not alter the principle, nor bring the case within the statute. *Ib.*

5. The orphans' court cannot decree a sale of real estate for the payment of legacies. *Skillman* v. *Van Pelt*, 511

*Vide* EXECUTORS AND ADMINISTRATORS, 3.
WILL, 15.

P.

PARTIES.

*Vide* PLEADING, I.

PARTNERSHIP.

1. Whether land purchased by partners in trade, as between themselves, or between them and their creditors, is to be considered as real or personal estate? *Quere.* But where, as in this case, no claims of creditors interfered, and the partners themselves had not considered the property as partnership property, but treated it as real estate, and separately sold and conveyed their respective moieties, at different times, and for different prices, it must be considered as real estate. *Smith* v. *Wood*, 74

2. Where real estate is purchased with partnership funds, but the conveyance made to one of the partners alone, although the legal title vests in him, he holds the one moiety in trust for the benefit of the other partner. *Baldwin* v. *Johnson*, 441

3. If the partner thus holding the legal title gives a mortgage upon the property after the dissolution of the partnership, after an agreement that the other partner should take all the partnership property and pay all the debts, the mortgage will not avail in equity unless held by a *bona fide* purchaser without notice. *Ib.*

4. After the dissolution of a partnership, the authority of an individual partner over the joint stock ceases; he cannot use it for his private benefit, or in any way inconsistent with the closing of the partnership business. *Ib.*

5. The whole of the partnership property is liable for the partnership debts; if all cannot be paid, they must be paid *pro rata:* this court cannot establish a preference, on the ground of an unauthorized act of one of the partners after the dissolution. *Ib.*

PAYMENT.

1. The party making payment has the right of directing its application to the discharge of any particular demand he may think fit, provided he does it at or before the time of making the payment; but if the payment is made generally, without any such direction, then the person receiving may apply the payment to any demand in his hands against the person by whom, or on whose account, the payment is made. *Smith* v. *Wood*, 74

2. When there is a general payment made by A., by a draft in favor of B., without any specific appropriation by A.—and B. gives a receipt for the

draft—"when paid, to be applied, first, to pay interest, and next, so much principal on Jones's bonds and mortgage on the Millville property"—this is an express appropriation of the funds, by which all parties are bound. It cannot afterwards be altered, but by mutual consent; and then, not to affect the rights of third persons. *Ib.*

3. Connected with the facts, that no interest was paid and no demand made, length of time may be set up to show that nothing was due, as well as to raise a presumption of payment. *Wanmaker's Ex'rs* v. *Van Buskirk*, 685

4. A non-claim for *twenty years*, when the parties are in the way and there is opportunity for asserting the demand, is strong evidence against the existence of a debt. *Ib.*

5. Still it is but a presumption; and the fact that the parties interested were nearly related, and the collection of the money might have occasioned distress, and even the payment of interest inconvenience, taken in connection with the fact, that part of the money included in the mortgage was an advancement, and not to be repaid, is sufficient to repel it. *Ib.*

6. To authorize a court to say, from mere lapse of time, unless very extraordinary, that a debt never existed, there should be no repelling or explanatory circumstances: it requires a stronger case than one which will justify the court in deciding that a debt, once due, has been satisfied or released. *Ib.*

7. Yet where length of time is relied on as evidence of payment, it may be repelled by showing that the party was a near relation, or was insolvent. *Ib.*

8. As to mortgages, the presumption of payment may be raised by lapse of time without interest being paid or demanded, but what shall be a sufficient length of time to raise such presumption has not been clearly settled. *Ib.*

9. The better opinion appears to be, that such a presumption would attach at the end of *twenty years* without payment or demand of principal or interest; but admitting this to be the rule, it is but a presumption, and may be repelled by a variety of circumstances. *Ib.*

PLEADING.

*I. Pleading in General, Parties.*
*II. Bill.*
*III. Answer.*
*IV. Plea.*
*V. Demurrer.*

*I. Pleading in General, Parties.*

1. The rules of pleading in a court of equity, are not so technical and precise as in courts of law. The powers of the court, and modes of administering relief, authorize and require greater liberality. Still, when principles have by repeated adjudications become settled, it is quite as important that these principles should be preserved in this as any other court. *Marselis* v. *The Morris Canal and Banking Co.*, 31

2. The court will not permit several plaintiffs to demand by one bill, several matters perfectly distinct and unconnected, against one defendant; nor one plaintiff to demand several matters of distinct natures, against several defendants. *Ib.*

*Vide* IDIOTS AND LUNATICS.

*II. Bill.*

3. Where the demands of several complainants united in the same bill, are entirely distinct and independent; where there is no privity between them; no general right to be established as against the defendant; no common interest in all the complainants, centering in the point in issue in the cause; no general right claimed by the bill and covering the whole case; no rights established in favor of complainants; and no demand made, that the funds of the defendant shall be applied to the payment of the complainants' claims after their adjustment; and where their claims are not in *rem* but in *personam*—the bill cannot be sustained. *Marselis* v. *The Morris Canal and Banking Co.*, 31

4. A bill by several to compel the specific performance of a contract for the sale of real estate, in which the complainants hold distinct rights, cannot be sustained. *Ib.*

5. Where, upon a bill filed by the wife for a divorce *a mensa et thoro*, on the grounds of cruelty and desertion, it appears from the evidence that the defendant had a former wife living in Scotland at the time of the marriage with complainant, a case is presented entirety different from that made by the bill, and no decree can be made. The bill dismissed, but without costs. *Zule* v. *Zule*, 96

6. To enable an executor to maintain a suit in this court, it is necessary that the fact of the probate of the will should be stated in the bill. *Eden's Ex'r* v. *Rathbone*, 331

7. When that is done, and no objection raised by the pleadings, a probate taken out at any time before the hearing is sufficient. *Ib.*

8. Alleging in the bill that the complainant "hath taken upon himself the burthen of executing the trusts and duties required of him by the will, and become duly qualified as executor," is not sufficient to show his right to sue in the capacity of executor. *Ib.*

9. An original bill was filed by Rachel Eden, as executrix, and also as devisee in trust, under the will of Medcef Eden, deceased, which the defendant answered. Upon the death of the complainant, a bill of revivor and supplement was filed by J. Pelletreau, stating himself to be executor and devisee in trust under the will of the said Medcef Eden, and also administrator of the said Rachel Eden, deceased; which was demurred to for multifariousness. But the bill of revivor corresponding with the original bill, and bringing before the court the persons representing the parties to that bill, and it not appearing that the complainant relied on the supplemental matter, or any claim he might have as devisee in trust, it was held well. *Ib.*

10. An ejectment bill, technically so termed, is one brought simply for the recovery of real property, together with an account of rents and profits, without setting out any distinct and substantive ground of equity jurisdiction, which would be demurrable where there is no proper ground of equity. *Crane* v. *Conklin*, 346

11. But a bill to set aside a fraudulent conveyance, filed by those who without the incumbrance of such conveyance are undoubtedly entitled, is altogether different from an ejectment bill, and comes within the ordinary powers of this court. *Ib.*

12. The bill should be framed to meet the case, so that the *allegata* and the *probata* may agree, with reasonable certainty. It is as important that this rule should be adhered to in this court as in a court of law. *Axtell's Adm'r* v. *Axtell*, 494

*III. Answer.*

13. The general rule is, that when matter is set up by the defendants in avoidance of the complainants' claim, it must be proved otherwise than by the answer. *Miller* v. *Wack*, 204

14. The statute (*Rev. Laws*, 667, *s.* 2) directing that answers to bills of divorce "shall not be under oath;" the answer, though sworn to, cannot be considered as evidence for any purpose. *Miller* v. *Miller*, 386

15. If a defendant in his answer *charge* certain facts to exist, on which he intends to rely for his defence, and swears to the answer in the ordinary form, he swears to the *truth* of the facts, and not to the *fact* of the charge; and if the facts as charged are not true, perjury may be assigned upon it. *Quackenbush* v. *Van Riper*, 476

16. It is not sufficient for the defendant in his answer to say he does not know it, or does not believe it; as that may be all true, and yet the fact charged be uncontradicted. *Ib.*

17. What is necessary, and sufficient, in an answer. *Ib.*

18. It is not sufficient for a defendant, claiming to be a bona fide purchaser for valuable consideration without notice, to deny personal knowledge of the matters charged, without denying

notice, before his contract. He must deny notice, even though it be not charged; and he must deny it positively, and not evasively; he must even deny fully, and in the most precise terms, every circumstance from which notice could be inferred. *Wilson* v. *Hillyer*, 63

*IV. Plea.*

19. A plea, if not denied by a replication, must on the argument be considered as true. *Cammann* v. *Traphagan's Ex'r*, 28

20. A plea in equity should set forth plainly and explicitly every matter necessary to constitute a complete defence and bar to the complainant's claim; for if it be allowed by the court as correctly pleaded, and is afterwards proved, the cause is at an end. *Meeker* v. *Butler's Ex'r*, 198

21. The delivering up of vouchers on the settlement of an account is not essential, and such an averment in a plea is unnecessary. *Ib.*

22. When the bill is *for an account*, it is not required that the plea should set out the account; although this is the proper course when *the account is impeached* by the bill. *Ib.*

23. When all the allegations of the plea being taken as true, do not make out a full defence, or when necessary facts are to be gathered by inference alone, the plea cannot be sustained. *Ib.*

24. Where omissions in a plea are accidental, and can readily be supplied, the defendant may be allowed to amend his plea in such particulars if he requests it. *Ib.*

*V. Demurrer.*

25. A general demurrer admits the truth of all the material allegations of the complainant's bill that are well pleaded. *Smith* v. *Allen*, 43

26. Where a bill is filed for discovery and relief, the demurrer (if any) must be to both and not to the discovery alone. *Miller* v. *Ford*, 358

PRACTICE.

*I. Amendment.*
*II. Costs.*
*III. Hearing and Re-hearing, Reference to Master, Orders, Ne Exeat, Depositions, Consolidation of Suits, &c., &c.*

*I. Amendment.*

1. Where omissions in a plea are accidental and can readily be supplied, the defendant may be allowed to amend his plea in such particulars if he request it. *Meeker* v. *Butler's Ex'r*, 198

2. Amendments to a plea ordered to be made in twenty days, and a copy furnished to the complainant's solicitor free of expense, and in default thereof the plea ordered to stand for an answer with leave to the complainant to except to it. *Ib.*

3. The general principle is, that a party is bound to state all his case in his first bill. But if the complainant, after filing his bill, discover that he has omitted to state any matter, or to join any person as party to the suit, he may supply the defect by amendment. *Buckley* v. *Corse*, 504

4. If the defendant has answered, and the complainant thereby obtains farther knowledge of facts or circumstances which may aid him in the case, he may amend his bill, and proceed according to the information thus obtained. *Ib.*

5. In general, any imperfection in the form of a bill may be remedied by amendment, as occasion may require, if application for that purpose is made in time. *Ib.*

6. Before replication, the order to amend is granted of course. *Ib.*

7. After an injunction is dissolved on the merits, the party may amend and obtain an injunction on the amended bill. *Ib.*

8. First amendments are frequently allowed on coming in of the answer, without special affidavits, on reasonable terms. *Ib.*

9. Injunction bills may be amended without prejudice to the injunction, and even amended a second time; but the application for such second amendment must disclose its nature, and be founded on affidavit that the complainant had not a knowledge of the facts so as to enable him to bring that case on the record sooner. *Ib.*

*II. Costs.*

10. Upon dissolving an injunction to restrain proceedings on a judgment at law, and dismissing the bill, the costs ordered to be paid out of the moneys deposited in court, and the remainder of the deposit ordered to be paid to the defendant on his judgment at law. *Cammann* v. *Traphagan's Ex'r*, 230

11. Where there was an offer to redeem and the money tendered before suit brought, but the conduct of the mortgagee in possession, in not receiving, not appearing to have been improper or vexatious, each party ordered to pay their own costs. *Hill* v. *White*, 435

12. Where an injunction on an original bill was dissolved with leave to the complainant to amend his bill, and on the amended bill a second injunction was granted—on motion made to dissolve the second injunction because irregularly obtained, such appearing to have been the case, the injunction was continued, but complainant ordered to pay the costs of the original bill, and of all proceedings up to the time of filing the amended bill, and also the costs of the motion to dissolve. *Buckley* v. *Corse*, 504

*III. Hearing and Re-hearing, Reference to a Master, Orders, Ne Exeat, Depositions, Consolidation of Suits, &c., &c.*

13. On a petition and order for re-hearing generally, the whole case is open; and the party supposing himself aggrieved, has a right to insist on a re-consideration of any part of it. *Glover* v. *Hedges*, 113

14. Where the master, not supposing it referred to him, expresses no opinion on a material point; if either party have farther evidence, and desire it, a further reference will be ordered. *The Dutch Church at Freehold* v. *Smock*, 148

15. The master having stated the executors' accounts jointly, and it not appearing by which of them the excess of the debts, &c., over the personal estate was advanced, a farther reference ordered. *Ib.*

16. Where persons interested in the sale of mortgaged premises are not made parties to the bill of foreclosure, and file a bill for discovery and relief, alleging the mortgage to be usurious and fraudulent, an order in the nature of an injunction may issue, restraining the complainants in the original suit from proceeding therein until the further order of the court. *Miller* v. *Ford*, 358

17. Application to discharge a *ne exeat*, not having been made until after the cause was noticed for final hearing, refused. *Miller* v. *Miller*, 386

18. All such parts of depositions as go to prove matters in no way put in issue by the pleadings, ordered to be stricken out. *Ib.*

19. Where two bills were filed by the executors of two several testators, who were tenants in common of all their property, and devised it to the same persons, where the parties interested, and their rights, were the same under both wills; the two suits, on their hearing, may be consolidated, so that one investigation and report of the master, and one decree, may settle the whole. *Conover's Ex'rs* v. *Conover*, 403

20. The practice of examining witnesses a second time, on the same matter, disapproved. *Crawford* v. *Bertholf*, 458

21. Upon hearing, on bill, cross-bill, answers and depositions, where both causes came on to be heard together; and each party has material allegations to sustain under their respective bills; the complainant in the original bill is entitled to the opening and reply. *Stults* v. *Murphy*, 560

22. Probate of a will granted in one state, cannot be used in the courts of

another. *Eden's Ex'r* v. *Rathbone*, 331

*Vide* INJUNCTION, 11–14.

PROMISSORY NOTE.

*Vide* BILLS OF EXCHANGE. MORTGAGE, 20–22.

R.

REDEMPTION, EQUITY OF.

*Vide* MORTGAGE, III.

REFERENCE TO MASTER.

*Vide* PRACTICE, III.

REHEARING.

*Vide* PRACTICE, III.

RELIGIOUS SOCIETY.

1. If the doctrines held by any religious society be important in determining a question of property, the party who would avail themselves of their doctrines must prove them—page 682. *Hendrickson* v. *Decow*, 577

2. Where a fund was raised by members of a religious society known as "the Chesterfield Preparative Meeting of the Society of Friends, or people called Quakers, at Crosswicks," for the declared purpose, "that the principal should remain a permanent fund, under the direction of the trustees of the school at Crosswicks, to be chosen by the said preparative meeting; and the interest should be applied to the education of such children as then or thereafter should belong to the same preparative meeting, whose parents should not be of ability to pay for their education;"—this fund may not be divided as often as this body shall separate, and parts of it diverted from its declared purpose, and appropriated to the education of children of persons connected with other religious persuasions—page 670. *Ib.*

3. The trust can be exercised only by a meeting of the religious *society of Friends;* and the fund can be used only for the education of children of persons belonging to a meeting of that society —page 670. *Ib.*

4. It is a body of Friends, with their settled and known characteristics at that time, which is contemplated in the trust—page 671. *Ib.*

5. It is proper and legal that the court should notice the doctrine of the preparative meeting which is to superintend the expenditure of this fund—page 683. *Ib.*

6. A separation of a portion of the religious society of Friends constituting the yearly meeting of the society, from that meeting, does not necessarily destroy or impair it, nor as it respects its legal existence, even weaken the original institution—page 652. *Ib*

7. A portion of any religious society can not disfranchise the rest, declare the society dissolved, erect among themselves a new body within the limits of the ancient society, and declare that to be the ancient society—pages 644–5–6. *Ib.*

8. Where an officer of a religious society was duly appointed, and the term of his office does not cease by limitation of time, the presumption is that he remains in office, until competent evidence of his due removal is given; and whoever claims on the ground that his office has ceased, must establish it by lawful and sufficient proof—page 600 *Ib.*

9. When a majority of an elective body protest against the election of a proposed candidate, and do not propose any other candidate, the minority may elect the candidate—page 621. *Ib.*

10. *Semble.* That where a donation is made for the use of a certain religious society at a particular place, the right is local and vests in such religious society at that place: it also vests in a society at that place of the same religious persuasion, holding and professing the same religious opinions, doctrine and belief; and if that society should become divided in religious opinion, and separate into two dis-

tinct bodies, holding different doctrines, the right of property would remain with that portion of the society which held the same religious opinions, doctrine and belief, which the original society held at the time the donation was made, without regard to the fact whether they were a majority or minority of the members of the original society *Ib.*

RENTS.

*Vide* EXECUTORS AND ADMINISTRATORS, 2.
HEIRS AND DEVISEES, 1.
LANDLORD AND TENANT, 1.

8.

SHERIFF AND SHERIFF'S SALE.

1. Mere inadequacy of price is not sufficient to avoid a contract or set aside a sale made by the sheriff, when no fraud or irregularity appears. *Semble.* That leaving personal property purchased at sheriff's sale in the possession of the defendant, is not, of itself, sufficient to vitiate the sale. *Bank of New Brunswick* v. *Hassert,* 1

2. Where a sheriff, *colore officii,* takes a bond for the performance of matters not authorized by the statute, the bond is void. *Smith* v. *Allen,* 43

3. After a judgment is satisfied, the sheriff has no authority to sell, and his deed can convey no interest to the purchaser. *Simmons' Ex'r* v. *Vandegrift,* 55

4. The legal process of execution in the hands of the sheriff is not affected, or the title of a purchaser at the sheriff's sale impaired, by an attachment issued against the plaintiff in the execution, and levied on the money in the hands of the defendant, after the execution levied, and before the sale. *Ib.*

5. Mere inadequacy of price, without fraud or collusion, is not sufficient to set aside a purchase at sheriff's sale. *Ib.*

6. Irregularity in the sheriff selling lands before goods, without a written request from the defendant, cannot affect the title of a purchaser at the sheriff's sale, unless the purchaser had notice of it. *Ib.*

7. Where the purchase at the sheriff's sale was made at the request, or with the consent of the defendant in execution, and for his benefit, upon an express agreement, that he should be at liberty to redeem; and complainant was to hold such interest under the sheriff's deed as would indemnify him for the money advanced; and the one intended to give, and the other to receive, a valid security; although it turns out to be insufficient in law, yet the purchaser has, in equity, a vested lien on the property for the amount of his demand, and the defendant is estopped from coming into this court and setting up any defect in the title. *Vanness* v. *Vanness,* 248

8. The conveyance of the sheriff under these circumstances is to be considered as the act of the defendant himself, and he shall not be permitted to impugn it; as between him and the purchaser he is precluded. *Ib.*

9. The sheriff is bound to sell according to law, and the exigency of his writ; he is not justified in imposing terms on the purchaser different from those imposed by the law. If he undertakes, by any conditions of sale, to vary the relative position of parties, and create liabilities which the law does not impose, he exceeds his authority, and the purchaser is not bound. *Stevenson* v. *Black,* 338

SPECIFIC PERFORMANCE.

*Vide* AGREEMENT.

SURVEY.

The word *survey* does not necessarily, *ex vi termini,* mean a *map* or profile: they are sometimes used as convertible terms, not always. The books filed by the Camden and Amboy Railroad and Transportation company, in the office of the secretary of state, containing a description (in words and figures) of the commencement of the road, the different stations made at the time of the survey, the courses and distances between those stations,

and the number of stations, to the termination of the road, is "a survey" within the meaning of that provision of the charter which requires that "a survey of such route and location (of the road) shall be deposited in the office of the secretary of state;" at least so far forth as to warrant the court in refusing an injunction on the ground that no survey whatever has been made. Injunction refused. *Attorney-General* v. *Stevens*, 369

SURVEYORS OF HIGHWAYS.

*Vide* CHOSEN FREEHOLDERS.

T.

TRESPASS.

*Vide* INJUNCTION, 18, 20.

TRIAL BY JURY.

*Vide* CONSTITUTION,

TRUST AND TRUSTEE.

1. Collateral securities to creditors are considered as trusts created for the better protection of their debts, and equity will see that they fulfil their design. *Skillman* v. *Teeple*, 232

2. Where a trust is created for the benefit of a person without his knowledge at the time, he may afterwards affirm the trust and enforce its performance. *Ib.*

3. It is a rule well settled in the English chancery, and adopted by this court, that if trustees loan money without *due security*, they are liable in case of insolvency. *Gray* v. *Fox*, 259

4. As to what is due security, the principle to be extracted from the English authorities is, that the loaning of trust moneys, and especially when infants are concerned, on private or personal security, is not a compliance with the rule that requires due security to be taken, and of course, that such loans are made at the risk of the trustees; but this rule has not been adopted in its full extent in this court. *Ib.*

5. Where trustees have managed a farm with prudence, and for the benefit of the property, and account for the whole net proceeds; although it might, perhaps, have been rented for something more, yet they ought not to be charged for the deficiency unless it can be considered as growing out of their "default or neglect." *State Bank at Elizabeth* v. *Marsh.* 288

6. The general principle is well settled, that trustees are not entitled to compensation for services rendered in the performance of their trust; under the order for "just allowances," they are entitled only to *charges* and *expenses*. *Ib.*

7. But when by the interlocutory decree, the master was directed to allow to the trustees "a just compensation for their *trouble*, charges and expenses, in taking care of the property, making sales thereof, or otherwise in and about the same"—they may not only be allowed for charges and expenses, but also be compensated for their trouble in taking care of the property, making sales thereof, and executing the trust, by a commission, which is preferable to the allowance of a gross sum. *Ib.*

8. In cases of *direct trust*, such as mortgages of real estate, and pledges of personal property, the court will give aid on its own peculiar principles. *Disborough* v. *Outcalt*, 298

9. When a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser, of the estate sold; and the purchaser as trustee of the purchase money, for the vendor. *Crawford* v. *Bertholf*, 458

*Vide* CORPORATION, 9.
EXECUTORS AND ADMINISTRATORS, 8
MORTGAGE, 9, 26.
ORPHANS' COURT, 2–4.

U.

USE AND OCCUPATION.

*Vide* LANDLORD AND TENANT.

USURY.

1. In a suit in equity, upon a mortgage or other instrument tainted with usury, the defendant may set up the usury, and, if he can prove the facts, may avoid the instrument, according to the letter of the statute. *Miller* v. *Ford*, 358

2. But when a party goes into court, seeking relief from the operation of an usurious instrument, he must offer to do what equity and good conscience requires at his hands; that is, to pay the sum actually due; and if he omit to make such offer, the defendant may demur. *Ib.*

V.

VENDOR AND PURCHASER.

1. It is not sufficient for a defendant, claiming to be a bona fide purchaser for valuable consideration without notice, to deny personal knowledge of the matters charged, without denying notice, before his contract. He must deny notice, even though it be not charged; and he must deny it positively, and not evasively; he must even deny fully, and in the most precise terms, every circumstance from which notice could be inferred. *Wilson* v. *Hillyer*, 63

2. On a bill by the vendor, for specific performance of a contract for the sale of land at auction; where it appears that the vendee was induced to make the purchase by the fraudulent contrivance and management of the vendor, he can have no remedy to enforce the contract in a court of equity: but where the charge of fraud or collusion is not established against the complainant, the relief he seeks cannot be rightfully withheld on that ground. *Rodman* v. *Zilley*, 320

3. So the vendee being intoxicated at the time, and not in a situation to judge correctly, or act with prudence, will not avail him to avoid the contract, unless he can show that it was procured by the contrivance of the vendor, or that an unfair or improper advantage was taken of his situation. *Ib.*

4. Where a vendor conveys land by deed with covenant of warranty, which is subject to a mortgage; if the amount of the mortgage is raised out of the premises conveyed, and paid to satisfy the mortgage, the vendee can immediately recover it back, by action against the vendor, on his covenant. *Shannon* v. *Marselis*, 413

5. So if the vendor was prosecuting the vendee, on his bond for purchase money, this court would enjoin him, and compel him to appropriate the money so as to discharge the incumbrance against which he had covenanted. *Ib.*

6. Where a vendor conveys land which is subject to a prior mortgage, by deed, with covenant of warranty; and the vendee gives a mortgage to the vendor for purchase money, which the vendor assigns to a third person, and a bill is filed upon the prior mortgage, against the vendor, vendee and assignee of the second mortgage; if any part of the premises so conveyed is taken to satisfy the first mortgage, the vendee has a right to have so much deducted out of his purchase money, or the mortgage given by him for purchase money, in the hands of the assignee. *Ib.*

7. Every man purchases at his peril, and is bound to use some reasonable diligence in looking to the title and the competency of the seller; it will not answer to rest on mere reputation or belief, unless the party intends to rely on his covenant alone. *Baldwin* v. *Johnson*, 441

8. The rule is, that a person claiming protection (as a bona fide purchaser) must have paid the money; to have secured it is not sufficient. *Ib.*

9. When a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser, of the estate sold; and the purchaser as trustee of the purchase money, for the vendor. *Crawford* v. *Berthol*f, 458

10. As a consequence of this rule, the purchaser may sell or charge the estate, before the conveyance is executed. He may come into this court, claiming a specific performance of the contract

and compel the execution of the title. *Ib.*

11. If he has been paid any part of the purchase money, he will be considered as having a lien on the property for the amount thus paid; and a court of equity will not compel him to render up possession, until he shall have been re-paid. *Ib.*

12. But all this proceeds on the principle of honesty and good faith between the parties; without this, equity will not interfere. If there be fraud in the transaction, equity will not yield its aid to the wrong doer, but will leave him to his legal remedy. *Ib.*

13. Upon an agreement for the sale of land, of which a memorandum in writing was made as follows:—"January 17, 1829. This may certify that James Ivins has agreed with the heirs of Samuel Hendrickson, deceased, for the farm where Garret Hendrickson now lives, and the said James Ivins is to give them forty-eight dollars per acre for the same." Although not noticed in the agreement, it may be shown by parol evidence, that it was mentioned at the time of the agreement, and admitted by the vendee in an after-conversation, that the green grain then growing in the ground, and some wild cherry logs, were reserved in the sale; and this part of the agreement is not within the statute of frauds, and will be enforced in equity. *Hendrickson* v. *Ivins*, 562

14. And where the agreement existed, without any alteration in this respect, up to the time of executing the deed; and the deed was executed without it—whether it be considered a mistake in the scrivener in not inserting it, or inadvertence in the vendors in not insisting upon its insertion, is immaterial; the mistake in the deed will be rectified, so as to accord with the agreement of the parties. *Ib.*

15. In the case of vendor and purchaser the contract itself must govern; and must be construed according to its own terms, and not according to the customs or usages between landlord and tenant, in respect to the way-going crop. *Ib.*

16. Under a reservation, in a contract for the sale of land, of green grain in the ground, the whole crop, grain and straw, goes together and is reserved, under the term *green grain in the ground*. It is, *quo ad hoc*, an entirety, and cannot be separated into its component parts; and being reserved, it is as though the vendee had purchased the land without any such grain being in the ground, and he has no interest in it whatever. *Ib.*

17. Under such circumstances, the vendee was properly enjoined from prosecuting a suit against the vendors, for taking the grain and straw; and the injunction was continued. *Ib.*

## W.

### WASTE.

*Vide* INJUNCTION, 17–19.

### WATER COURSE.

1. Every man has the right to have the advantage of a flow of water on his own land, without *diminution or alteration;* but an adverse right may exist, founded on the prior occupation of another. The right is usufructuary; a right to the flow of water, not to the water itself. *Society for Establishing Manufactures* v. *The Morris Canal*, 157

2. The right to the use of a navigable stream is a right common to all the people of this state. Before the revolution, this right was in the crown; the people are now the sovereign power, and this right is vested in them. It is their property, and, as such, may be disposed of for the common benefit, in such way as they may see fit. This disposition can only be made by the legislature of the state, which is the rightful representative of the people: and where such disposition is made, "consistently with the principles of the law of nature, and the constitution of a well-ordered society," it must be considered valid. *Attorney-General* v. *Stevens*, 369

*Vide* CHOSEN FREEHOLDERS, 6.
CORPORATIONS, 2–6.

WAY-GOING CROP.

*Vide* LANDLORD AND TENANT.

WILL.

1. B. Tuthill, by his will, after some specific bequests, ordered "that all the rest of his estate, real and personal, be sold by his executors and turned into money, as soon after his decease as conveniently might be, and distributed among his children in the following proportions, viz.: two shares to each of his sons, and one share to each of his daughters," and provided "that none of the legacies should lapse by the death of any of his children, but that, in case of such death, the share of the deceased child should go to his or her issue in the proportions aforesaid, and if such deceased child should leave no issue, then his or her share should go to and among his surviving children, in the like proportions." *Herbert* v. *Tuthill's Ex'r*, 141

2. Upon the death of the testator, his children took vested interests in their respective shares, although payment could not be made until after the land should be sold, which in no wise affected the vesting of the estate. *Ib.*

3. By this bequest, the whole interest or estate in their respective shares, and not a life estate merely, vested in the children, notwithstanding there are no words of perpetuity or inheritance; the intent being clear. *Ib.*

4. The provision in case of the death of any of the children, with or without issue, refers to their death in the lifetime of the testator, and goes no farther than to prevent the lapse of their legacies. It does not amount to a limitation over, on the death of a legatee after the testator's death, and before receiving the legacy. *Ib.*

5. H. S., by his will gave to his wife "the sum of six hundred dollars, to be at her disposal during life." The personal estate proving insufficient to pay the debts, the deficiency was advanced by the executors, and the widow died without having received or disposed of her legacy; by this bequest, the widow took an absolute and vested interest in the legacy to her, and not merely a life estate with a power of disposition during life. Her not having received or disposed of it in her life-time, or the fact that it must now be raised out of the real estate in the hands of a purchaser, does not alter the nature of her estate. *The Dutch Church at Freehold* v. *Smock*, 145

6. When an estate is given to a person generally, with a power of disposition, it carries a fee. The only exception to this rule is, where the testator gives to the first taker, an estate for life *only*, by express words, and annexes to it a power of disposal; in that case the devisee for life will not take a fee *Ib.*

7. If the executor, while owner of the land, had paid the deficiency it was liable to pay to satisfy debts and legacies, it would have been considered paid in easement of the land, and the property would have been discharged. *Ib.*

8. The testator devised to his son a farm, &c., "to him, his heirs and assigns, provided he had lawful issue; but if he should die leaving no issue living, then the said property to be equally divided between his three sisters." These terms, "leaving no issue living," are now taken to mean a failure of issue at the time of the death of the devisee, and not an indefinite failure of issue; consequently, the estate devised, instead of being an estate tail, must be taken to be a contingent fee, with an executory devise over. *Wallington* v. *Taylor*, 314

9. But whether it be an estate tail, or a contingent fee, the power of the devisee over it is precisely the same; he has no power to commit waste, to destroy the inheritance. *Ib.*

10. The testator also bequeathed to his daughter Sarah, five thousand dollars, "to be paid to her by the said Samuel, out of the estate given to him, in annual payments of five hundred dollars a year." This legacy is a charge on the estate of the devisee, (in the devised premises,) not upon his person or upon the land. *Ib.*

11. Probate of a will granted in one state, cannot be used in the courts of another. *Eden's Ex'r* v. *Rathbone*, 331

12. J. B. by his will directed his executors to pay the interest of one moiety of his estate to the support and maintenance of his nephew Thomas Bullock, and R. his wife, and their children. The words "his wife," in this bequest, are to be taken as mere words of description, of the person intended to take, not that she must necessarily be the wife of Thomas Bullock, and take only in that capacity; and her interest in the bequest is not affected by a subsequent divorce. *Bullock* v. *Butcher's Ex'r*, 489

13. The testator devised as follows:—"I give and devise to my sons, Abraham and James, my farm whereon I now live; to them, their heirs and assigns for ever—to be equally divided between them—provided they or their heirs shall pay or cause to be paid to my executors herein after named, the sum of thirty-five hundred dollars, within eighteen months after my decease, which said sum of money is to be paid by them equally, each one half." Under this will, the devisees took an estate in fee simple in the devised premises, charged with the payment of seventeen hundred and fifty dollars each. *Skillman* v. *Van Pelt*, 511

14. The payment of this sum was not a condition, on the breach of which the right vested in the executors to sell: they could assert their claim under the will only by suit or bill. *Ib.*

15. The orphans' court could not decree a sale, founded on the supposed breach of any such condition: that remedy exists in this court alone. *Ib.*

*Vide* DOWER, 1, 4, 6, 8.
LEGACY, 1, 7.

WITNESS.

*Vide* EVIDENCE, 1, 2.
PRACTICE, 20.